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No. 83 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT LEE WILLIE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

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QUESTIONS PRESENTED

1. Does the denial of sequestration during voir dire violate a defendant's right to a fair trial by a panel of impartial, indifferent jurors under the standard of Irvin v. Dowd, 366 U.S. 717 (1961), at least under circumstances where (a) there has been massive prejudicial pretrial publicity and (b) many potential jurors have heard counsel for another alleged participant indicate in court that the defendant committed the crime with which he is charged?

2. May a court constitutionally deny a motion to change venue under the standard of Murphy v. Florida, 421 U.S. 794 (1975), on the basis of a voir dire proceeding which purportedly overcomes a presumption of prejudice from pretrial publicity, even though some potential jurors gave misleading or inaccurate answers about their actual prejudice and (b) four actual jurors heard counsel for another alleged participant indicate in court that the defendant committed the crime with which he was charged?

3. Is there prejudice amounting to a denial of constitutional due process under the standard of Donnelly v. DeChristoforo, 416 U.S. 637 (1974), when a prosecutor asserts in closing argument that the defendant should be given the death sentence because (a) the law says that if the jurors had come to the scene while the crime was being committed, they would have been right to kill the defendant and (b) if the defendant is given a life sentence, the jury will be telling him that his life is more valuable than the victim's?

4. May the Louisiana Supreme Court constitutionally uphold a death sentence on the basis of a proportionality review limited to one judicial district under the standard of Maggio v. Williams, ___ U.S. ___, 52 U.S.L.W. 3363 (U.S., Nov. 7, 1983) (per curiam), where life sentences, not death sentences, have been imposed in the only similar cases from that judicial district?

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

Petitioner Robert Lee Willie respectfully prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court in this case.

CITATION TO OPINIONS BELOW

The opinion of the Louisiana Supreme Court tentatively affirming Mr. Willie's conviction is reported at 410 So.2d 1019 (La. 1982) and is submitted herewith as Appendix 1. The opinion of the Louisiana Supreme Court affirming his conviction and death sentence is reported at 436 So.2d 553 (La. 1983) and is submitted herewith as Appendix 2.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered in early September 1983. By order dated November 1, 1983, Justice White granted an application extending petitioner's time to file this

petition to and including November 30, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to * * * an impartial jury;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Robert Lee Willie was convicted of first degree murder in the Twenty-Second Judicial District Court for Washington Parish, Louisiana, and was sentenced to death. On appeal to the Louisiana Supreme Court, Mr. Willie's conviction was conditionally affirmed[1] but his sentence was vacated because the prosecutor's closing argument at the sentencing proceeding was held to have denied Mr. Willie a fundamentally fair trial. State v. Willie, 410 So.2d 1019, 1032-37 (La. 1982). On remand to the trial court, Mr. Willie was again sentenced to death. On appeal, the Louisiana Supreme Court unconditionally affirmed Mr. Willie's conviction and affirmed his sentence. State v. Willie, 436 So.2d 553 (La. 1983). Petitioner's co-indictee, Joseph Vaccaro, was tried

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1. The condition relating to the affirmance concerned a matter which is not the subject of this petition.

separately in a proceeding which occurred simultaneously with Petitioner's trial, in a different courtroom in the same courthouse. Mr. Vaccaro was found guilty of first degree murder but received a life sentence.

The Massive, Prejudicial Pretrial Publicity

Both Mr. Willie's trial and his second sentencing proceeding took place in Washington Parish. All jury members came from Washington Parish, a rural area with a population in 1980 of 44,207. (Bureau of the Census, U.S. Department of Commerce, 1980 Census of Population, "Number of Inhabitants, Louisiana," at 20-8 (1980), submitted herewith as Appendix 3.)

Prior to their trials, Mr. Willie and his co-indictee, Mr. Vaccaro, moved for a change of venue. In support of that motion, the defendants presented evidence of massive, highly prejudicial, pretrial publicity. This evidence included a series of articles from the Bogalusa Daily News, a newspaper with a circulation of 8,500 in Washington Parish (Vol. V of VII, at 17-18; Vol. III of VII, at 338-73, 375-80),[2] and which was read by the vast majority of all prospective and actual jurors at Mr. Willie's trials. Among these were 16 front-page stories between June 3 and August 13, 1980.

These articles did not merely report on the murder of Faith Hathaway, the crime for which Mr. Willie has been convicted and sentenced to death. They also included detailed accounts of another crime committed by Messrs. Willie and Vaccaro three days after Ms. Hathaway's murder, viz., the kidnapping of a 16-year-old

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2. References to "Vol. __ of VII, at __-__" are to pages in a numbered volume of the seven-volume record in the Louisiana Supreme Court of proceedings relating to Mr. Willie's trial. References to "Vol. __ of II, at __-__" are to pages in a numbered volume of the two-volume record in the Louisiana Supreme Court of proceedings relating to the proceedings on remand and in Mr. Willie's second sentencing proceeding. The referenced page numbers are those in the Louisiana Supreme Court's record, which may differ from the page numbers originally associated with a document.

girl and her boyfriend; their transportation of the kidnap victims across state lines to a wooded area where the girl was raped and where the defendants took the boyfriend out of his car trunk, tied him to a tree, shot him twice in the head, slashed his throat, and left him to die; the defendants' return to Louisiana; a second rape of the girl; defendants' release of the girl, after a third man talked them out of murdering her; the boyfriend's miraculous survival and difficult road to recovery; and Messrs. Willie and Vaccaro's guilty pleas to federal conspiracy and kidnapping charges relating to those events and their receipt of consecutive life sentences. The articles repeatedly linked together the foregoing events with the murder of Faith Hathaway, who was reported to be a friend of the 16-year-old girl who was raped and kidnapped.

Moreover, the Bogalusa Daily News articles frequently Willie and Vaccaro had "confessed" to having raped and killed Faith Hathaway. This "information" was attributed to Michael Varnado, an investigator employed by the District Attorney's office. Such reports seriously mischaracterized Mr. Willie's statement. He never said that he raped Ms. Hathaway, and he persistently and emphatically insisted that he did not kill her and would be willing to take a lie detector test to prove so. (Vol. I of VII, at 67, 71, 76; see Appendix 10 submitted herewith.)

As the trials neared, there were many additional articles in the Bogalusa Daily News, including a front-page article on October 15, 1980, five days before trial, reporting that the defendants were going to seek "to suppress taped confessions which the state claims to have." (Vol. III of VII, at 375, 379-80.) The defendants did not introduce into evidence any newspaper articles appearing between October 15 and October 20, when the trials began, but three members of Mr. Willie's jury said they had recently read or heard about the case. One of them had heard about it on the

radio on the morning of the trial. (Vol. VI of VII, at 216-17, 255-57.) Several veniremen who did not become jurors also said they had read or heard about the case recently. (Vol. VI of VII, at 146-48, 197, 214-15, 251, 276-77).[3]

In addition to the articles from the Bogalusa Daily News, the defendants submitted similar articles from several other newspapers and transcripts from television and radio stations. The newspapers included the Times-Picayune -- which some jurors said they read (Vol. VI of VII, at 277-78), the Enterprise -- which had a circulation of 2,500-2,600 in Washington Parish and which one of Mr. Willie's jurors read (Vol. V of VII, at 12-13; Vol. VI of VII, at 276-77; Vol. III of VII, at 322-25), and the ERA Leader -- which had a circulation of 3,000 in Washington Parish (Vol. V of VII, at 15-16; Vol. III of VII, at 326-37).

The Times-Picayune's articles included several detailed accounts of Mr. Willie's prior arrests, convictions and confinements. That newspaper also reported that Mr. Willie's father was serving time for attempted murder and had previously killed another man. The newspaper's source for these criminal histories was a sheriff's department official. (Vol. II of VII, at 170, 178, 265.)

One of the front-page articles in the Enterprise attributed to the District Attorney the statement that "We owe it to the citizens of St. Tammany and Washington parishes to make sure that these two animals do not walk our streets again." (Vol. III of VII, at 322; Vol. V of VII, at 12-13, 57-60.) Television coverage included a report that:

> "Officials working on the case say the rape and murder of Faith Hathaway was so horrible that it shocked even the most hardened lawmen. Already they're calling it the

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3. Several other jurors and veniremen said they had read "everything" that had appeared in the media or the newspaper about the case.

worst crime in the history of Washington Parish." (Vol. I of VII, at 130-31.)

Radio coverage indicated that this "has already been billed as the trial of the decade on the northshore." (Vol. I of VII, at 145.)

The defendants also called an expert psychiatrist, William Bloom, who testified that people might lie at the voir dire out of a feeling that the defendants were guilty "and that justice could only be done if they got on the jury." (Vol. IV of VII, at 524-25.) Dr. Bloom added that one person had seriously volunteered to him that he would lie to get on the jury in this case (id. at 525-26, 534), that all 20 of the people with whom he had discussed the case had said the defendants were guilty (id. at 525), that none of the 74 or 75 people whom Mr. Willie's attorney had surveyed felt the defendants were not guilty (id. at 531-32), and that the passage of time would not cause jurors to forget very vivid matters such as the key facts of this case (id. at 528-29).

The trial judge repeatedly declined to rule on defendants' motion to change venue until after the voir dire (Vol. IV of VII, at 550-51; Vol. V of VII, at 102-03; Vol. VI of VII, at 134-35).

The Conduct of the Voir Dire

Messrs. Willie and Vaccaro were tried separately but simultaneously in the same courthouse. Mr. Willie's trial took place downstairs while Mr. Vaccaro's was occurring upstairs.

Mr. Willie's attorney moved for sequestration of the entire panel prior to the voir dire and for individual sequestered voir dire. However, these motions were denied (Vol. VI of VII, at 134-35), as were Mr. Vaccaro's similar motions. Instead, the voir dire proceedings in both trials took place in open court. When more veniremen were needed at Mr. Willie's trial, people who had been peremptorily challenged or had not yet been questioned at Mr.

Vaccaro's voir dire were sent downstairs to Mr. Willie's trial. Meanwhile, the people who were peremptorily challenged at Mr. Willie's trial were sent up to Mr. Vaccaro's trial. Jury selection in both trials was completed in a single day.

As summarized by the Louisiana Supreme Court, 47 of the 52 prospective jurors in Mr. Willie's trial had read or heard about the case. Ten of them said they had a preconceived opinion, of whom six were successfully challenged for cause. State v. Willie, 410 So.2d 1019, 1024 (La. 1982). However, the Louisiana Supreme Court's decision fails to mention several other crucial facts about the voir dire, which are summarized below.

(i) Misleading Or Inaccurate Answers About Actual Prejudice By Veniremen Whom Petitioner Was Forced To Challenge Peremptorily

Petitioner Robert Lee Willie was given only the normal number of peremptory challenges, 12, for cases for which conviction results in (at least) mandatory imprisonment. His attorney's request for additional peremptory challenges was denied. (Vol. VI of VII, at 303-04.)

Two of these peremptory challenges were used against veniremen whose answers were either misleading or inaccurate. That is clear from a comparison of their answers at the Willie voir dire with their answers on the same day at the Vaccaro voir dire.[4]

Mrs. Erroil L. Jenkins said at the Willie voir dire that she had an opinion but that she could put her opinion aside and be fair. She said she understood that she had to ignore everything

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4. This Court can take judicial notice of the Vaccaro voir dire transcript, pursuant to Fed. R. Ev. 201. Green v. Warden, 699 F.2d 364, 368-69 (7th Cir.), cert. denied, 103 S. Ct. 2436 (1983); St. Louis Baptist Temple, Inc. v. Federal Deposit Insurance Co., 605 F.2d 1169, 1172-74 (10th Cir. 1979). That would be particularly justified here, since the Louisiana Supreme Court has cited the conduct of Mr. Vaccaro's jury in ruling that Mr. Willie's sixth amendment right to a fair jury was not violated. State v. Willie, 410 So.2d 1019, 1024 (La. 1982).

she had read and heard. (Vol. VI of VII, at 249-50.) Mr. Willie's counsel used one of his 12 peremptory challenges against her. Thereafter, at the Vaccaro voir dire, Mrs. Jenkins eventually said that she did not believe that she could put her preconceived ideas out of her mind and decide the case as fairly and impartially as if she had never heard about the case before. Mr. Vaccaro's attorney then succeeded in challenging her for cause. (Vaccaro Vol. VI, at 319-20, submitted herewith with Willie Vol. VI of VII, at 249-50, as Appendix 4.)[5]

Earlier, Mr. Willie's attorney used up another of his 12 peremptory challenges against Mrs. Bobby Sue Thomas, who said first that she did not know if she could be fair, because she had an opinion, but later said that she believed she could be fair despite having an opinion. (Vol. VI of VII, at 149-50, 189.) Thereafter, Mrs. Thomas was asked at Mr. Vaccaro's trial whether she had formed an opinion about the defendant's guilt or innocence, and she said she had not. (Vaccaro Vol. V, at 125, 129-30, submitted herewith with Willie Vol. VI of VII, at 149-50, 189, as Appendix 5.) It is reasonable to infer that Mrs. Thomas was an example of the inalterably biased juror about whom Dr. Bloom had testified, i.e., she was so biased against both defendants and so determined to get a chance to find at least one of them guilty that she understated the degree of her bias at Mr. Willie's trial and then denied bias altogether in a final attempt to get on Mr. Vaccaro's jury.[6]

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5. References to "Vaccaro Vol. _, at _-_" are to pages in volumes V and VI of the eight-volume record on appeal in the Louisiana Supreme Court in State v. Vaccaro, No. 81 KA 0660.

6. Mr. Willie's attorney used up two other peremptory challenges against Mrs. Judy F. Morris, who kept up with the case in the newspaper and on television and said "they wouldn't have arrested him unless they had some evidence against him in the first place to arrest him" (Vol. VI of VII, at 258-59, submitted herewith as Appendix 6) and Mr. George F. Thomas, who said that even if the State did not prove guilt beyond a reasonable doubt, he would expect Mr. Willie to prove he was not guilty (Vol. VI of VII, at 198), but who then agreed with the judge that he would weigh the evidence presented by the State before he would "expect anything" (id. at 200, submitted herewith with pp. 198 and 199 as Appendix 7).

(ii) Procedure Under Which Four Of Petitioner's Jury Members Heard Him Accused Of The Crime By Counsel For Another Alleged Participant

After using up 11 of his 12 peremptory challenges (four of which have been discussed in the text and footnote 6 on page 8), petitioner's counsel was confronted with a new panel of 14 veniremen. At least 11 of them had been at Mr. Vaccaro's voir dire, where 1 of them had been peremptorily challenged by the prosecution and 4 by the defense. Mr. Willie's attorney attempted to challenge for cause 1 of these latter 4 veniremen, Homer O. Branch, Jr. after Mr. Branch said that he had followed the case closely, thought what he saw was "pretty terrible," guessed he had made up his mind, was "pretty sure" he could ignore what he had read, and felt he could overcome his opinion and decide the case solely on the evidence. (Vol. VI of VII, at 298-99, submitted herewith as Ex. 8.) After his objection for cause was overruled, Mr. Willie's counsel felt compelled to use his final peremptory challenge against Mr. Branch. Faced with that predicament, Mr. Willie's counsel asked for but was denied additional peremptory challenges. (Vol. VI of VII, at 303-04.) As a result, 8 of Mr. Willie's 12 jurors came from the last panel of 14. Two of these jurors (Mrs. Edwards and Mr. Brumfield) had been peremptorily challenged by Vaccaro's attorney. (Vaccaro Vol. V, at 120, 122.)

It is not certain when those 2 jurors left the Vaccaro trial's courtroom. However, the record does show that 4 of the members of the jury which convicted Mr. Willie were still present at the Vaccaro trial when Vaccaro's attorney indicated that Mr. Willie had killed Faith Hathaway by slashing her throat, whereas Mr. Vaccaro was just an innocent bystander. Mrs. Burt D. Sharp, Mr. Thomas Craig Wilkins (also known as Craig Thomas), Mr. Julius A. Savant and Mr. Walter J. Fournet were all sent down from the Vaccaro courtroom to the Willie trial at page 188 of the Vaccaro

voir dire, and they all became members of Mr. Willie's jury (Vol. VI of VII, at 305). Yet, only a few pages earlier, at page 176, Vaccaro's attorney had made the following statement:

> "Let me give you another example, let's say Mr. Vaccaro was there and let's say he is drunk or on pills or whatever, and not himself, and let's say that Robert Willie says hold her hand and Joe doesn't know what is going on, he holds her hand and Mr. Willie comes up to her and kills her. Mr. Vaccaro didn't know he was going to kill her.
>
> "My question to you is, in that situation, would you automatically vote first degree murder on a case like that?" (Vaccaro Vol. V, at 176.)

Then, just three pages before these jurors left for the Willie trial, they heard Vaccaro's lawyer say:

> "It is not enough to prove that Robert Willie killed Faith Hathaway, but the State must prove that Joseph Vaccaro was a principal and that he intended it and that he participated in it and that he is guilty himself." (Id. at 185; submitted herewith with pages 176 and 188 and with Willie Vol. VI of VII, at 305, as Appendix 9.)

These same four jurors later heard Mr. Willie's statement introduced at his trial. That statement repeatedly emphasized that it was Vaccaro, not Willie, who had slashed Ms. Hathaway to death. Mr. Willie insisted that he had been shocked by Vaccaro's actions and had never expected Ms. Hathaway to be killed. (Vol. I of VII, at 64, 67, 75-76, submitted herewith as Appendix 10.) The jurors also heard Mr. Willie's attorney assert in closing argument that the only pertinent evidence in the case (i.e., Willie's statement) showed that Vaccaro cut her throat, and that Willie was totally surprised when Vaccaro killed her. In short, Willie's defense was that he had neither killed nor intended to kill Ms. Hathaway (Vol. VII of VII, at 520, 526-27, submitted herewith as Appendix 11.) However, because of the manner in which the voir dire had been conducted, these four jurors had previously heard Vaccaro's attorney give a diametrically opposite description of what had happened.

The Prosecutor's Two Unconstitutional Arguments
In Support Of The Death Sentence

At Mr. Willie's second sentencing proceeding, the prosecutor presented (inter alia) two unconstitutional arguments in urging the jury to sentence Mr. Willie to death. The first was:

> "Now let me ask you this, and this is the law. Suppose that through an act of God that one of you at the moment that Robert Willie is between her legs and that Joe Vaccaro is holding her hands, that one of us walked up on that scene, nude girl, blindfolded, probably screaming, scared to death, and God willed it that we had a gun, I think almost everyone of us without hesitation would have blown them both away and that we'd have grabbed that little girl and if we had a blanket we'd have wrapped her, and we would have hugged her, and we would have been proud of ourself that we saved her life, that we kept her from being raped, and we wouldn't have had one bit of remorse that we used the gun and we'd have been right under the law. The law says that we would have been right to do exactly what we did. Well, if we have that right and the law says that we have that right, as it does, then we also have the right to impose the ultimate penalty on Robert Willie." (Vol. II of II, at 188-89, submitted herewith as Appendix 12.)

Under that misstatement of the law, the death sentence should be imposed whenever a citizen would be justified in using deadly force to stop a crime from occurring.

The prosecutor concluded his argument as follows:

> "Why is the only punishment death? Because if we as a community, if you as a group of citizens are going to say that life is valuable, you are going to say that Faith Hathaway had a right to live. If you believe that that little girl had a right to live, a right to go about her life, she may have never married a senator or president, but she was trying to do something constructive with her life. She was going in the service. It's not easy for somebody to do. But if you are going to say that she had a right to live, which she certainly did, and that Robert Willie didn't have a right to take her life, then as punishment for Robert Willie taking her life, you're going to give him life, where is the justice of it? If you're going to hold anything holy about the life of Faith Hathaway, if you're going to say that it has any value at all, you've got to say the death penalty, because otherwise you're saying Robert Willie, your life is more valuable than Faith Hathaway's, your life means more than Faith Hathaway. I certainly hope that you can't say that. The evidence certainly doesn't indicate that his

> life is even close to the value to that of Faith Hathaway, but even being putting a value on it, the two lives. He took her life. He deserves that." (Vol. II of II, at 192-93, submitted herewith as Appendix 13.)

Under that misstatement of the law, the death sentence should be imposed whenever the convicted defendant's life is no more valuable than the victim's. The trial judge gave absolutely no curative instructions in response to these arguments but instead went directly into his prepared charge.

The Louisiana Supreme Court's Proportionality Review Upholding This Death Sentence Despite Finding Only Life Sentences In Similar Cases

The Louisiana Supreme Court is required to determine whether a death sentence "is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Louisiana Supreme Court Rule 28, § 1(c), adopted pursuant to La. Code Crim. Proc. Ann. Art. 905.9 (West Supp. 1983) (submitted herewith as Appendix 14). The Louisiana Supreme Court purported to make such a determination in Mr. Willie's case. Confining itself only to the judicial district in which the trial was conducted, the Court found that there was only one case with somewhat similar facts. In that case, the defendant was given a life sentence, but the Louisiana Supreme Court speculated that because the defendant was "a person with mental problems * * * the jury may have concluded that his responsibility was diminished * * *." State v. Willie, 436 So.2d 553, 559 (La. 1983). The Court then concluded that:

> "Considering the sentence review memoranda submitted by both the state and the defendant, and the paucity of similar cases, the sentence imposed on the defendant, Robert Lee Willie, cannot be said to be disproportionate." (Id.)

The Louisiana Supreme Court recognized earlier in its opinion that Mr. Vaccaro, Mr. Willie's co-defendant, had received a life sentence for the same crime, but it found that

> "A death sentence is not necessarily disproportionate because one defendant in a factually similar

> case received life imprisonment. * * * While Willie may have been less culpable than his criminal partner, there is nothing to indicate that his role was a subsidiary one. * * *" (Id. at 558 (citations omitted) (emphasis in original).)

Thus, the Louisiana Supreme Court found that Mr. Willie's death sentence was not disproportionate even though it found no similar case in which a death sentence had been imposed. The Court did not choose to look at cases from other parts of the state even though in the only two similar cases it found, including the very same case, the defendants were given life imprisonment.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. On October 20, 1980, immediately before the voir dire began, Petitioner sought sequestration of the entire panel and moved for individual sequestered voir dire. Those motions were denied. (Vol. VI of VII, at 134-35.) Before trial testimony began, Petitioner objected to the manner in which the voir dire had been conducted. His counsel asserted that a fair jury had not been selected because he had not been able to question jurors about the specifics of the publicity as much as he felt necessary. That was due to the failure to sequester the veniremen individually when they were questioned. The objection was overruled. (Vol. VI of VII, at 321.) Following the trial, Petitioner raised the sequestration issue in a motion for a new trial, which was denied. (Vol. II of VII, at 306-08, 313-14.)

On appeal, the Louisiana Supreme Court held that Mr. Willie had failed to show that the trial judge had misused his discretion when he denied Mr. Willie's motion for a sequestered voir dire. State v. Willie, 410 So.2d 1019, 1024-25 (La. 1982). It also rejected Petitioner's argument "that an error patent on the face of the record might require reversal of the conviction," holding that "A review of the record shows no errors patent." Id., at 1032.

2. Petitioner moved for a change of venue and repeatedly sought a ruling thereon prior to the trial. (Vol. IV of VII at 550-51; Vol. V of VII, at 102-03; Vol. VI of VII, at 135.) On all of these occasions, the judge refused to rule until after the voir dire. (Id.) Following the voir dire, the trial judge denied the motion to change venue, and Petitioner objected to that ruling. (Vol. VI of VII, at 321.) After the trial, Petitioner raised the venue issue in his motion for a new trial. The motion was denied. (Vol. II of VII, at 306-07, 313-14.)

On appeal, the Louisiana Supreme Court stated that it had made an independent evaluation of the complete trial record in considering the venue issue. The Court indicated that there had been a thorough voir dire and that while virtually all the veniremen had read or heard about the case, only 10 of the 52 veniremen had said they had formed an opinion. After noting the 6 successful challenges for cause and Petitioner's 12 peremptory challenges, the Court concluded that each of the jurors selected was qualified under the standard set forth in Irvin v. Dowd, 366 U.S. 717 (1961). The Court added that the fact that the verdict in Vaccaro's simultaneous trial was a life sentence, not a death sentence, "reflects some degree of discernment in assessing the evidence * * *." State v. Willie, 410 So.2d 1019, 1024 (La. 1982). The Court completed its discussion by stating that most of the publicity was straight news reporting almost two months before trial; that government officials were minimally responsible for the publication of objectionable material; and that there were no other inflammatory factors such as racial strife, the murder of law enforcement officials "or an egregious event such as a televised confession." Id. (citations omitted.) In summarizing the jury selection and comparing the actions of the Willie and Vaccaro juries, the Louisiana Supreme Court failed to mention any of the egregious facts discussed at pages 7-10, supra.

3. The Louisiana Supreme Court held that there was "no indication or contention that passion, prejudice or any arbitrary factor entered into the death sentence" given Mr. Willie at his second sentencing proceeding. State v. Willie, 436 So.2d 553, 559 (La. 1983). The opinion does not discuss the prosecutor's closing argument. However, the Louisiana Supreme Court had the power to review that argument and to vacate the death sentence because of it, notwithstanding defense counsel's failure to object to it at trial and his failure to advert to it on appeal. Indeed, it was the prosecutor's injection of arbitrary factors in argument at the same point in Petitioner's original sentencing proceeding that had caused the State Supreme Court to vacate the original death sentence, even though defense counsel had failed either to object at trial or to mention the prosecutor's closing argument on appeal. See State v. Willie, 410 So.2d 1019, 1036 & n.4 (La. 1982) (Lemmon, J., concurring).

4. The Louisiana Supreme Court held, after purporting to conduct a proportionality review, that Petitioner's death sentence was not disproportionate. It also rejected Petitioner's argument that his sentence was excessive, in view of Mr. Vaccaro's life sentence for exactly the same crime. State v. Willie, 436 So.2d 553, 557-59 (La. 1983). As described at pages 12-13, supra, the Louisiana Supreme Court found the death sentence not to be excessive or disproportionate based on a review of the first degree murder cases from one judicial district. In the only two similar cases, the defendants were given life sentences. No one in a similar case had received the death sentence.

REASONS FOR GRANTING THE WRIT

This Court has never considered whether, under circumstances of massive, prejudicial pretrial publicity, the Constitution requires that voir dire be conducted in a special way, such as sequestered questioning of individual veniremen. That issue has

arisen frequently in recent years, but the federal circuit courts have not agreed upon clear Constitutional guidelines which state and federal courts must follow. Mr. Willie's voir dire proceedings were conducted in a manner which caused the jury to be inherently prejudiced against him. Hence, this case presents an appropriate opportunity for this Court to articulate the Constitutional requirements for selecting a fair, unbiased jury in a highly publicized case.

This case also affords this Court an opportunity to clarify the standards to be applied in determining a separate Constitutional issue, viz., under what circumstances may a presumption of jury prejudice warranting a change of venue be successfully rebutted by the fact that only a minority of veniremen said they had an opinion about the case? In the wake of Irvin v. Dowd, 366 U.S. 717 (1961), and Murphy v. Florida, 421 U.S. 794 (1975), many courts have considered the percentage of veniremen who express a bias to be an extremely crucial factor. However, as the present case starkly demonstrates, such percentages present a very incomplete picture when veniremen give false or misleading answers or are affected by an inherently prejudicial circumstance about which the trial judge and defense counsel are unaware. Accordingly, this petition presents an appropriate occasion to address a serious Constitutional question not determined by Irvin or Murphy.

A third substantial Constitutional question raised by this petition concerns the circumstances under which highly prejudicial statements by a prosecutor in closing argument in a capital sentencing proceeding may deny the defendant a fundamentally fair trial. That due process issue has never been squarely addressed by this Court, but it has arisen frequently in recent years. This petition raises the Constitutional issue in a substantial way, because it concerns a prosecutor's remarks which invited the jury to impose the death sentence on the basis of factors

which no state could constitutionally incorporate in a death sentence statute.

The final serious question raised by this petition is whether a state may constitutionally impose the death sentence on the basis of a limited proportionality review in which life, not death, sentences were imposed in the only similar cases. That question is similar, but not identical, to the issue which this Court will consider in Pulley v. Harris, cert. granted, 103 S.Ct. 1425 (1983). Hence, even if this Court does not grant certiorari in this case, it should defer a decision on this petition pending its decision in Pulley, supra.

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DENIAL OF SEQUESTRATION DURING VOIR DIRE VIOLATES A DEFENDANT'S RIGHT TO A FAIR TRIAL BY A PAENL OF IMPARTIAL, INDIFFERENT JURORS UNDER THE STANDARD OF IRVIN v. DOWD, 366 U.S. 717 (1961), AT LEAST UNDER CIRCUMSTANCES WHERE (a) THERE HAS BEEN MASSIVE, PREJUDICIAL PRETRIAL PUBLICITY AND (b) MANY POTENTIAL JURORS HAVE HEARD COUNSEL FOR ANOTHER ALLEGED PARTICIPANT INDICATE IN COURT THAT THE DEFENDANT COMMITTED THE CRIME WITH WHICH HE IS CHARGED

This Court has never considered the Constitutional requirements for special modes of voir dire, such as sequestered questioning of each venireman, that may be necessary when there has been massive, prejudicial pretrial publicity. The Court has looked instead at veniremen's answers regarding their preconceived opinions and their ability to be fair, in determining that "Where one's life is at stake -- and accounting for the frailties of human nature * * * the finding of impartiality does not meet constitutional standards." Irvin v. Dowd, 366 U.S. 717, 727-28 (1961) (finding constitutional standards not met); see Murphy v. Florida, 421 U.S. 794, 799-803 (1975) (finding constitutional standards met).

The federal circuit courts have dealt with the constitutionality of particular voir dire methods, but they have not agreed upon a uniform constitutional standard. For example, in United States v. Hawkins, 658 F.2d 279 (5th Cir. Unit A 1981), the Fifth Circuit held that in the wake of extensive, prejudicial pretrial publicity to which most veniremen had been exposed, due process was denied when the trial judge merely inquired of the panel en masse (a) whether anyone had formed an opinion about the defendants' guilt or innocence and (b) whether anyone felt that he could not be fair and impartial or would be influenced by the publicity. Id. at 282, 285. The Fifth Circuit held that more than such abbreviated questioning was needed in order for the trial judge to determine for himself whether the potential jurors were impartial. Id. at 285. However, the Fifth Circuit did not set forth any clear standard regarding how such constitutional violations should be avoided. Instead, the court said that when "time consuming, probing, preferably individual voir dire" is constitutionally necessary, it need not "always be conducted apart from the other jurors." Id; accord, United States v. Davis, 583 F.2d 190, 196-97 & nn. 8-9 (5th Cir. 1978) (Sequestered examination of individual jurors, in accordance with recommendations of the ABA Standards Relating to Fair Trial and Free Press § 3.4(a) (Approved Draft, 1968), "is sometimes preferable" but "is not necessarily required.")[7]

The First Circuit has expressed a preference for sequestered questioning of veniremen where there is a strong "possibility that jurors have been exposed to potentially prejudicial material." Patriarca v. United States, 402 F.2d 314, 318 (1st Cir. 1968) (dictum), cert. denied, 393 U.S. 1022 (1969). However, that

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7. In Johnson v. Beto, 337 F.Supp. 1371, 1379 (S.D. Texas), aff'd, 469 F.2d 1396 (5th Cir. 1972) (per curiam), failure to allow sequestered individual questioning of veniremen was held to have denied the defendant due process.

court has not decided whether such a procedure may ever be constitutionally required.

Most recently, the Sixth Circuit's en banc decision in United States v. Blanton, ___ F.2d ___, Nos. 81-5643-45 (6th Cir. Sept. 28, 1983) (en banc) (available Nov. 29, 1983 on Lexis, Genfed library, Cir. file), considered the constitutional principles applicable to voir dire proceedings in a highly publicized case. However, no clear standard was enunciated. Instead, the court held that the voir dire was constitutional because of six factors, including (a) the trial judge's sensitivity to any hint of bias and liberal granting of challenges for cause and (b) the substantial increase in the defense's peremptory challenges. Id. at 8.

Mr. Willie's case provides a clear opportunity for this Court to enunciate for the first time the Constitutional requirements for special voir dire methods in cases involving massive, prejudicial pretrial publicity. As set forth above, the publicity here involved not only details of the sensational murder with which Willie and Vaccaro were charged; it also included (a) erroneous reports that both of them had confessed to killing the victim, (b) detailed accounts of both defendants' criminal histories and that of Mr. Willie's father, (c) gruesome accounts of the kidnapping, rape and attempted murder in which Willie and Vaccaro were also involved three days after Ms. Hathaway's murder, (d) their guilty pleas to federal charges, and their consecutive life sentences, and (e) the District Attorney's reported statement that the defendants were "animals." In view of the continuation of the publicity right up until the day the trial began, and the fact that the trial was held in a rural parish with about 40,000 residents, this case cried out for a special method of voir dire.

Unfortunately, the only thing that was really special about the voir dire method was the system whereby veniremen who were peremptorily challenged or no longer needed at Vaccaro's

trial were sent down to participate in Willie's trial. Far from sequestering the entire panel and having sequestered, individual questioning of each venireman, the judge followed a procedure under which four of the jurors who convicted Mr. Willie heard much of the voir dire in Mr. Vaccaro's case as well as some of the voir dire in Mr. Willie's case. The failure to adopt the sequestered voir dire procedure which Mr. Willie had sought thus resulted in four of his trial jurors hearing Vaccaro's lawyer indicate in court that Mr. Willie had killed Ms. Hathaway. (See pages 9-10, supra.)

This voir dire procedure must be held unconstitutional because it resulted in the kind of inherent prejudice that has been held to require reversals of numerous other convictions. When four of Mr. Willie's jurors heard his co-defendant's lawyer implicate him, that raised the same kind of Confrontation Clause problem as in Bruton v. United States, 391 U.S. 123 (1968); only here the problem was even worse because there was no curative instruction.[8] Indeed, Mr. Willie's constitutional rights were violated in an even more egregious fashion than in Turner v. Louisiana, 379 U.S. 466 (1965), in which key prosecution witnesses had custody of the jurors. In Turner, there was no proof that any improper remarks were actually made to the jury.

Mr. Willie was at least as prejudiced as the defendants in Marshall v. United States, 360 U.S. 310 (1959) (federal prosecution), Goins v. McKeen, 605 F.2d 947 (6th Cir. 1979) (state prosecution), and United States v. Williams, 568 F.2d 464 (5th Cir. 1978) (federal prosecution), in which jurors read or saw prejudicial stories about the defendant during the trial. In all three cases, unlike Mr. Willie's case, the affected jurors were questioned by

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8. In view of Mr. Willie's persistent emphatic denials that he either killed or intended to kill Ms. Hathaway, Parker v. Randolph, 442 U.S. 62 (1979), is inapplicable here.

the trial judge and assured him that they could be fair. Nevertheless, all the convictions in those cases were reversed because of the inherent prejudicial effect of publicity occurring once courtroom proceedings had begun. Similarly, Mr. Willie was inherently prejudiced by the accusation against him by Vaccaro's defense counsel in the upstairs courtroom, but since he, his counsel and the trial judge were all in the downstairs courtroom at the time and because Mr. Willie's counsel was not allowed to question the four affected jurors (or anyone else) in a sequestered fashion, they did not find out what those four jurors had heard.

In short, the consequence of the voir dire method used in Mr. Willie's case was the same as that in another Louisiana case, Rideau v. Louisiana, 373 U.S. 723, 726 (1963): "Any subsequent court proceedings * * * could be but a hollow formality." At least some such unconstitutional trials will be avoided if this Court takes advantage of the opportunity presented by this petition to set forth clear Constitutional standards for conducting voir dire proceedings in highly publicized cases.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A COURT MAY CONSTITUTIONALLY DENY A MOTION TO CHANGE VENUE UNDER THE STANDARD OF MURPHY v. FLORIDA, 421 U.S. 794 (1975), ON THE BASIS OF A VOIR DIRE PROCEEDING WHICH PURPORTEDLY OVERCOMES A PRESUMPTION OF PREJUDICE FROM PRETRIAL PUBLICITY, EVEN THOUGH (a) SOME POTENTIAL JURORS GAVE MISLEADING OR INACCURATE ANSWERS ABOUT THEIR ACTUAL PREJUDICE AND (b) FOUR ACTUAL JURORS HEARD COUNSEL FOR ANOTHER ALLEGED PARTICIPANT INDICATE IN COURT THAT THE DEFENDANT COMMITTED THE CRIME WITH WHICH HE WAS CHARGED

In both Murphy v. Florida, 421 U.S. 794 (1975), and Irvin v. Dowd, 366 U.S. 717 (1961), a major factor in this Court's decision on the fundamental fairness of the trial was the percentage of veniremen who indicated that they were biased as a result of pretrial publicity. In Irvin, almost 90% of the prospective

jurors had an opinion about defendant's guilt, and a total of 268 of the 430 veniremen were excused on challenges for cause. Such opinions about defendant's guilt also pervaded the selected jury, and this Court held that the defendant had been denied a trial by an impartial jury. Id., 366 U.S. at 727-28. In Murphy, this Court held that the defendant's constitutional rights had not been violated. It distinguished Irvin, by pointing to the contrast between the statistics in Irvin mentioned above and the fact that at Murphy's voir dire only "20 of the 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt." Murphy v. Florida, 421 U.S. 794, 803 (1975).

Federal appeals courts have also considered the percentage of veniremen expressing bias on the basis of pretrial publicity to be an extremely crucial factor when considering defendants' claims that their sixth and fourteenth amendment rights have been violated by the failure to change venue. For example, in Yount v. Patton, 710 F.2d 956 (3d Cir. 1983), the Third Circuit compared the percentages of veniremen who expressed bias in Irvin, Murphy and several circuit court cases. It found that Yount's panel was more like that in Irvin than that in Murphy, since "three-quarters of the veniremen admitted to an opinion of guilt which they could not set aside." Id. at 970-71. The court then held that a fair trial was impossible in that venue, in view of the pretrial publicity, the voir dire statistics, and the equivocal or negative assurances of impartiality by the selected jurors. Id. at 972.

In the wake of Murphy and Irvin, and circuit court cases such as Yount, supra, there is a pressing need for this Court to articulate the other factors besides the percentages of biased veniremen which must be considered in determining whether the prejudicial effects of massive pretrial publicity have been overcome. The danger of allowing appellate courts to look principally at the percentage of biased veniremen is highlighted by the

Louisiana Supreme Court's disposition of Mr. Willie's case. Looking mainly at the fact that only 10 of the 52 veniremen said they had formed an opinion, the Louisiana Supreme Court held that a fair jury had been selected. State v. Willie, 410 So.2d 1019, 1024 (La. 1982). However, in relying on that calculation, the court overlooked the facts that Mr. Willie was not given the benefit of any doubts when he tried to make challenges for cause; that Mr. Willie was not given any more than the normal number of peremptory challenges; that Mr. Willie's attorney stated that he had been unable to ask sufficiently probing questions to uncover further instances of bias because the questioning was not conducted in a sequestered fashion; that, as defendants' expert had anticipated, at least 2 of the 12 veniremen whom Mr. Willie peremptorily challenged gave false or highly misleading answers which understated their bias;[9] that veniremen who had been challenged upstairs by Vaccaro later ended up downstairs on Willie's jury; and that four of Willie's veniremen heard Vaccaro's attorney indicate that Willie had killed Faith Hathaway.[10]

Undoubtedly, if such factors had been present in Murphy's case and if the pretrial publicity there had been as inflammatory as that here, this Court would have overturned Murphy's conviction notwithstanding the low percentage of biased veniremen. To ensure that state and lower federal courts also realize that mechanical formulas do not suffice, this Court should grant this petition for certiorari. The Court will then have an excellent opportunity to hold that numerous factors besides mathematical percentages must be

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9. As noted at pages 7-8, supra, one of them was later successfully challenged for cause at Vaccaro's trial.

10. In view of the foregoing facts unique to Willie's trial and the fact that only Willie's jury heard the unconstitutional closing argument which caused the Louisiana Supreme Court to vacate his initial death sentence, the fairness of Mr. Willie's jury is in no way demonstrated by the fact that Vaccaro's jury imposed a life sentence. Hence, the Louisiana Supreme Court's reliance on Vaccaro's sentence, 410 So.2d at 1024, is misplaced.

considered before a court may hold that a fair jury was selected notwithstanding massive, prejudicial pretrial publicity.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THERE IS PREJUDICE AMOUNTING TO A DENIAL OF CONSTITUTIONAL DUE PROCESS UNDER THE STANDARD OF DONNELLY v. DeCHRISTOFORO, 416 U.S. 637 (1974), WHEN A PROSECUTOR ASSERTS IN CLOSING ARGUMENT THAT THE DEFENDANT SHOULD BE GIVEN THE DEATH SENTENCE BECAUSE (a) THE LAW SAYS THAT IF THE JURORS HAD COME TO THE SCENE WHILE THE CRIME WAS BEING COMMITTED, THEY WOULD HAVE BEEN RIGHT TO KILL THE DEFENDANT AND (b) IF THE DEFENDANT IS GIVEN A LIFE SENTENCE, THE JURY WILL BE TELLING HIM THAT HIS LIFE IS MORE VALUABLE THAN THE VICTIM'S

This Court has never articulated the standards that must be applied in determining whether a prosecutor's closing argument in a capital sentencing proceeding denies the defendant due process. The Court's most recent decision in this general area was Donnelly v. DeChristoforo, 416 U.S. 637 (1974), which held that a prosecutor's ambiguous remarks which were followed by the trial court's specific disapproving instructions did not cause prejudice amounting to a denial of due process.

Unfortunately, there have been numerous cases in which prosecutors have made statements during death sentence proceedings which have invited juries to impose the death sentence on the basis of passion or arbitrary factors. E.g., Brooks v. Francis, 716 F.2d 780, 788-90 (11th Cir. 1983); Hance v. Zant, 696 F.2d 940, 951-53 (11th Cir.), cert. denied, 103 S.Ct.3544 (1983); see Maggio v. Williams, ___ U.S. ___, 52 U.S.L.W. 3363, 3364 (U.S. Nov. 7, 1983) (Stevens, J., concurring). Mr. Willie's is yet another such case.

The prosecutor's closing argument in Mr. Willie's second sentencing proceeding contained two unambiguous, highly prejudicial assertions which were never disapproved by the trial judge. As set forth on pages 11-12, supra, the prosecutor first told the jury that the law says they would have been right in killing the defendant if they had come upon him while he was about to commit the crime.

The prosecutor then asserted that the jury would therefore be right to give the defendant the death sentence. The prosecutor finished his argument by saying that (a) the murder victim's life was precious and (b) if the jury gave the defendant a life sentence, it would be telling him that his life was worth more than his victim's, which it was not.

These assertions invited the jury to impose the death sentence on the basis of passion or arbitrary factors. The prosecutor's rationales would require that the death sentence be imposed (1) for every crime which citizens would be warranted in using lethal force to prevent and, independently, (2) whenever a murderer's life is no more valuable than the victim's. The second proposition would require the death sentence for virtually every murder.[11]

Those propositions are, of course, not the law in Louisiana. They were not even the law there at the time when the State imposed mandatory death sentences for certain types of first degree murder, a practice which this Court held unconstitutional in Roberts v. Louisiana, 428 U.S. 325 (1976).

Yet, as noted above, such misstatements of the law and flagrant appeals to impose the death sentence for emotional or arbitrary reasons are being made in numerous cases. Hence, petitioner submits, it is important that this Court address the issue so that prosecutors and judges alike will recognize the urgent need to put an end to such improper arguments.

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11. As in Vela v. Estelle, 708 F.2d 954, 966 (5th Cir. 1983), the injection of the victim's good character for the sentencing jury's consideration was "highly prejudicial" here. As the Fifth Circuit colorfully stated, "The State dropped a skunk into the jury box." Id.

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE LOUISIANA SUPREME COURT MAY CONSTITUTIONALLY UPHOLD A DEATH SENTENCE ON THE BASIS OF A PROPORTIONALITY REVIEW LIMITED TO ONE JUDICIAL DISTRICT UNDER THE STANDARD OF MAGGIO v. WILLIAMS, ___ U.S. ___, 52 U.S.L.W. 3363 (U.S. Nov. 7, 1983), WHERE LIFE SENTENCES, NOT DEATH SENTENCES, HAVE BEEN IMPOSED IN THE ONLY SIMILAR CASES FROM THAT JUDICIAL DISTRICT

In its recent decision in Maggio v. Williams, ___ U.S. ___, 52 U.S.L.W. 3363, 3364 (U.S. Nov. 7, 1983) (per curiam), this Court held that a challenge to a district-wide proportionality review did not warrant a grant of certiorari. However, this case presents a strikingly different issue, which Petitioner submits does warrant a grant of certiorari, viz., may a state constitutionally uphold a death sentence on the basis of a proportionality review encompassing only part of a state when only life sentences have been imposed in that area for similar crimes. That is what occurred here, as discussed on pages 12-13, supra.

Petitioner submits that the death sentence cannot constitutionally be imposed where, as here, the state supreme court limits itself to consideration of cases from one judicial district; it finds life sentences in the only similar cases from that district; and it then says that the death sentence is nevertheless justified in view of the paucity of similar cases in that area. Under such circumstances, the State has simply not shown that it will be acting in a consistent, rational manner in executing the Petitioner. As Justices Stevens and Powell recently stated:

> "A constant theme of our cases -- from Gregg and Proffitt through Godfrey, Eddings, and most recently Zant -- has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." Barclay v. Florida, 103 S.Ct. 3418, 3429 (1983) (Stevens and Powell, JJ., concurring).

Louisiana has utterly failed to provide such protections to this petitioner. He is now subject to execution even though

there has been no finding of consistency. Instead, the Louisiana Supreme Court has declared that there are an insufficient number of similar cases to enable it to make a finding of consistency -- but it is that court's own refusal to look to other districts within the state that has prevented it from making the consistency determination. Petitioner submits that he should not be the fatal victim of the state supreme court's self-imposed impotency.

In any event, this issue is sufficiently similar to that presented by Pulley v. Harris, cert. granted, 103 S.Ct. 1425 (1983), and dissimilar to that presented by Maggio v. Williams, supra, that even if this Court does not grant certiorari, it should defer a decision on this petition pending its decision in Harris.

CONCLUSION

For all the reasons set forth above, the petition for certiorari should be granted.

Dated: November 30, 1983

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

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83-5836

IN FORMA PAUPERIS DECLARATION

United States ~~District Court For The~~ Supreme Court _____ ~~District of Louisiana~~

Robert Lee Willie
(Petitioner)

v.

Louisiana
(Respondent(s))

DECLARATION ~~IN SUPPORT OF~~ REQUEST TO PROCEED IN FORMA PAUPERIS

I, ROBERT LEE WILLIE, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without prepaying fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ( ) No (X)

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   NONE

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

   1980 - $800.00 per Month

2. Have you received within the past twelve months any money from any of the following sources?

   A. Business, profession or form of self-employment? Yes ( ) No (X)

   B. Rent payments, interest or dividends? Yes ( ) No (X)

   C. Pensions, annuities or life insurance payments? Yes ( ) No (X)

d. Gifts or inheritances? Yes ( ) No (X)

e. Any other sources? Yes ( ) No (X)

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

NONE

3. Do you own cash, or do you have money in checking or savings account?

Yes (✓) No (include any funds in prison accounts.) If the answer is "yes," state the total value of the items owned.

$10.00 prison account

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ( ) No (X)

If the answer is "yes," describe the property and state its approximate value.

NONE

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

NONE

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed On: 12/8/83

Robert Lee Willie
Signature of Petitioner

Sworn to and subscribed before me this 8 day of December 1983 Lucy Hallisky

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $ 4.04 on account to his credit at the Angola LSP institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution _____

DRAWING 4.04

SAVINGS —00—

Robert L Willie #99317

DATE
DEC 07
CERTIFIED

Jacqueline Johnson
Authorized Officer of Institution

No. 83 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

83-5836

ROBERT LEE WILLIE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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consideration than as a consideration bearing on guilt or innocence.[2]

Since I view *Burch* and *Ballew* (as did the three dissenters in *Brown*) not as a complete rejection of the reliability of five-person juries, but rather as a determination of the point where the "line drawing" for jury size should occur, I would not prohibit the state from using the earlier convictions in order to enhance relator's sentences.

STATE of Louisiana

v.

Robert Lee WILLIE.

No. 81-KA-0242.

Supreme Court of Louisiana.

Jan. 25, 1982.

Rehearings Denied March 19, 1982.

Defendant was convicted before the Twenty-Second Judicial District Court, Parish of Washington, Hillary J. Crain, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Dennis, J., held that: (1) refusal to change venue was not error; (2) per se rule against further police-initiated custodial interrogation after request for counsel was inapposite to situation in which state officers interviewed defendant at jail about state offenses six days after he refused to answer FBI agent's questions about unrelated federal crimes without lawyer being present; (3) evidence sufficiently established corpus delicti so as to permit defendant's confession to be admitted into evidence; (4) remand was required for determination whether undisclosed note, used as evidence or otherwise at trial, or further evidence gained from note's inspection and analysis, would create reasonable doubt as to defendant's guilt; (5) argument, in which prosecuting attorney asked jury to assume that defendant would be pardoned or have his sentence commuted in considering whether he should live or die and in which prosecuting attorney inaccurately stated that a future governor considering defendant's application for pardon or commutation would more than likely not know the facts of the case and that a life sentence never exacted lifetime imprisonment, was error requiring that sentence be set aside and a new penalty hearing be held; and (6) another argument during penalty phase was misleading and improper.

Conviction conditionally affirmed; sentence vacated; remanded.

Lemmon, J., concurred and assigned reasons.

Marcus, J., concurred in part and dissented in part and assigned reasons.

Marcus and Watson, JJ., would grant state's application for rehearing only.

Watson, J., concurred in conditional affirmance of conviction, but dissented from reversal of sentence.

1. Criminal Law ⇐126(1)

Relevant factors in determining whether to change venue include: nature of pretrial publicity and degree to which it has circulated; connection of government officials with release of publicity, length of time between dissemination of publicity and trial; severity and notoriety of offense; area from which jury is to be drawn; other events occurring in community and affecting or reflecting attitude toward defendant; factors likely to affect candor and veracity of prospective jurors; degree to which publicity has circulated in areas to which venue could be changed; care exercised and ease encountered in jury selection; familiarity with publicity and its resultant effect on jurors; and peremptory challenges for cause exercised by defendant. LSA-C.Cr.P. art. 622.

2. The relators in this offense are fourth offenders challenging only one prior conviction.

2. Criminal Law ⇐1139

Though trial court possesses broad range of discretion in ruling on motion for change of venue in criminal proceeding, Supreme Court is required to make independent evaluation of facts to determine whether accused has received fair trial, unfettered by outside influences. LSA–C.Cr.P. art. 622.

3. Criminal Law ⇐126(2)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, refusal to change venue was not error under circumstances under which only ten of the prospective jurors had formed opinion as to guilt or innocence, under which each selected juror's qualifications met minimum requirements, under which extent that governmental officials were responsible for publication of objectionable matter was minimal, under which, though crime was vile and outrageous and was thoroughly covered by news media, it was not attended by other inflammatory factors and under which both defendant and victim were of same race and were not residents of parish in which trial was being held. LSA–C.Cr.P. art. 622.

4. Jury ⇐131(13)

Burden is on defendant to show that court has misused its discretion in refusing to sequester venire during voir dire. LSA–C.Cr.P. arts. 784, 784 comment, 786.

5. Jury ⇐131(13)

In first-degree murder prosecution in which individual questioning of prospective jurors was permitted, trial court's denial of motion for sequestration of jurors during voir dire was not shown to have been misuse of discretion. LSA–C.Cr.P. arts. 784, 784 comment, 786.

6. Criminal Law ⇐590(2)

In first-degree murder prosecution, refusal to grant continuance four days before trial was not shown to have been abuse of discretion under circumstances under which, though defense counsel received amended discovery responses only four days before trial and was notified only one month before trial that state would definitely try the murder case on that date, it was not established that counsel was prevented from making adequate preparation for trial. LSA–C.Cr.P. art. 712.

7. Criminal Law ⇐641.12(2)

In first-degree murder prosecution in which defendant moved to have himself transferred from federal penal facility to either of two jails four days before trial and during trial to facilitate assistance of defense counsel, trial judge's decision to have defendant made available to counsel at the federal facility and to arrange for further conferences if necessary before defendant was returned to such facility on days during the trial was reasonable and a proper exercise of judge's discretion.

8. Criminal Law ⇐655(4)

Trial judge's remarks, during voir dire in criminal proceeding, that "Now if the state does prove in presenting their case guilt in your mind beyond a reasonable doubt, then you would legitimately expect something else, but it all depends on the state's proof, not on what the defense puts up * * * what you weigh is the state's evidence * * * if * * * they have failed to prove something that is necessary in order to obtain guilt, then at that time the defense has the right not to put on anything * * *," would not have been considered, by an average juror, as referring to defendant's failure to testify. LSA–C.Cr.P. art. 770.

9. Criminal Law ⇐412.2(2)

Prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of defendant unless prosecution demonstrates use of procedural safeguards effective to secure privilege against self-incrimination; unless other fully effective measures are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, a person must be informed, prior to any question, that he has right to remain silent, that any statements he does make may be used in evidence against him and that he has right to pres-

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10. Criminal Law ⇐412.2(4, 5)

Defendant may waive his rights to remain silent and to presence of retained or appointed attorney during custodial interrogation provided the waiver is made voluntarily, knowingly and intelligently, but if defendant indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. U.S.C.A. Const.Amend. 5.

11. Criminal Law ⇐412.2(5)

When accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. U.S.C.A.Const.Amend. 5.

12. Criminal Law ⇐412.2(4)

Accused, having expressed his desire to deal with police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, unless accused initiates further communication, exchanges or conversations with the police. U.S.C.A.Const.Amend. 5.

13. Criminal Law ⇐412.2(4)

Per se rule against further police-initiated custodial interrogation after request for counsel was inapposite to situation in which state officers interviewed defendant at jail about state offenses six days after he refused to answer FBI agent's questions about unrelated federal crimes without lawyer being present, in that defendant's privilege against self-incrimination was protected by "other effective means" when federal magistrate had informed defendant of his rights and offered to appoint counsel for him, he signaled willingness to discuss crimes with law enforcement authorities, state officers asked defendant if he wanted attorney present and defendant waived that right. LSA–Const.Art. 1, § 13; U.S.C.A.Const. Amends. 5, 6.

14. Criminal Law ⇐412.2(4)

Miranda is not to be read to impose absolute ban on resumption of questioning at anytime or place on any subject after defendant has made request for counsel. LSA–Const.Art. 1, § 13; U.S.C.A.Const. Amends. 5, 6.

15. Criminal Law ⇐531(3)

Evidence, at hearing on motion to suppress defendant's murder confession, indicated that his will had not been overborne and that confession had been made freely and voluntarily. LSA–C.Cr.P. art. 703, subd. D; LSA–R.S. 15:451.

16. Criminal Law ⇐535(1)

Accused cannot be convicted on his own uncorroborated confession without proof of the corpus delicti.

17. Criminal Law ⇐535(2)

Corpus delicti must be proven by evidence which jury may reasonably accept as establishing that fact beyond reasonable doubt.

18. Homicide ⇐228(1), 236(1)

Before there can be conviction for murder, death of the person alleged to have been killed, together with criminal agency of someone as the cause of the death, must be established beyond reasonable doubt.

19. Criminal Law ⇐535(2)

In prosecution for first-degree murder, evidence, including evidence that medallion around neck of partly decomposed body and other items found near the body were the belongings of certain person, that teeth within the body were such person's teeth and that there was slash-like opening in neck and a vaginal laceration, sufficiently established corpus delicti so as to permit defendant's confession to be admitted into evidence.

20. Constitutional Law ⇐268(5)

Defendant's right to be protected against prosecution's failure to disclose exculpatory evidence is founded on due process clause and is designed to assure a fair trial and not to deter prosecutorial misconduct. U.S.C.A.Const.Amend. 14.

21. Criminal Law ⇐1171.8(1)

Conviction obtained by knowing use of perjury must be aside if there is any reasonable likelihood that false testimony could have affected judgment of jury.

22. Criminal Law ⇐627.8(6)

Standard for materiality, in cases in which specific evidence has been suppressed despite a pretrial request for such evidence, is whether the suppressed evidence might have affected the outcome of trial.

23. Criminal Law ⇐1166(1), 1171.1(1)

In cases in which there has been a general request for disclosure of evidence or no request at all, a conviction will be overturned, on the basis of failure to disclose evidence, if the omitted evidence creates a reasonable doubt which did not otherwise exist.

24. Criminal Law ⇐1181

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, case would be remanded for determination whether note, which was found at scene of crime, which contained the words "you will never catch us" or "you never find her" and which State failed to disclose in response to a general request for disclosure, would, if used as evidence or otherwise at trial, or whether further evidence gained from note's inspection and analysis, would, on its evaluation in context of the entire record, create a reasonable doubt as to defendant's guilt.

25. Criminal Law ⇐1213

In prosecution for first-degree murder, denial of defendant's motion to quash indictment based on contention that first-degree murder statute provided for cruel and unusual punishment was not error. LSA-R.S. 14:30; U.S.C.A.Const.Amend. 8.

26. Witnesses ⇐337(5)

In prosecution for first-degree murder, refusal to grant motion to restrain district attorney from using prior convictions on cross-examination was not error, though it was argued that defendant would be inhibited from testifying unless the motion were granted. LSA-R.S. 15:495.

27. Criminal Law ⇐829(1)

In prosecution for first-degree murder, refusal to give two requested jury charges was not error, in view of fact that substance of such charges were included in the general charge. LSA-C.Cr.P. art. 807.

28. Criminal Law ⇐1171.1(6)

In first-degree murder prosecution in which defendant was sentenced to death, argument, in which prosecuting attorney asked jury, during penalty phase, to assume that defendant would be pardoned or have his sentence commuted in considering whether he should live or die, in which attorney inaccurately stated that a future governor considering defendant's application for pardon or commutation would more than likely not know the facts of the case and that a life sentence never exacted lifetime imprisonment and which jury was not instructed to disregard, was error requiring that sentence be set aside and a new penalty hearing be held. LSA-C.Cr.P. arts. 774, 905.2-905.5.

29. Criminal Law ⇐1206(1)

Constitutionality of a death penalty scheme depends on whether jury's discretion is channeled and guided by clear, objective and specific standards.

30. Criminal Law ⇐1206(1)

Capital punishment procedure, which leaves to jury's unbridled discretion the selection of those defendants to receive death sentence, will be struck down as unconstitutional.

31. Criminal Law ⇐1208(1)

Having found a statutory aggravating circumstance, jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstances so found, before recommending either a penalty of life imprisonment without parole or a sentence of death. LSA-C.Cr.P. arts. 905.2, 905.3.

32. Criminal Law ⇐1144.17

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William J. Guste,
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S. Austin McEl
fendant-appellant.

DENNIS, Justice

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trial court, Supreme Court must presume that death sentence was imposed under influence of an arbitrary factor unless the record clearly indicates that jury was properly informed of its duty and admonished to disregard the improper remarks, and the record indicates that jury heeded the admonition. LSA–C.Cr.P. arts. 774, 905.2–905.5.

33. Criminal Law ⇐1171.1(6)

Prosecutor's argument conveying message that jurors' responsibility, in regard to determining whether death sentence should be imposed, is lessened by fact that their decision is not the final one, or which contains inaccurate or misleading information, deprives defendant of a fair trial and requires that death penalty be vacated. LSA–C.Cr.P. arts. 774, 905.2–905.5.

34. Criminal Law ⇐713

In first-degree murder prosecution in which defendant was sentenced to death, prosecuting attorney's argument, during penalty phase, that responsibility for death sentence started with jurors and was passed on to a series of courts and that "everything" would more than likely be reviewed by "every appeals court in the state," state supreme court, federal district court, federal appellate courts and United States Supreme Court was misleading and improper. LSA–C.Cr.P. arts. 774, 905.2–905.5.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Marion B. Farmer, Dist. Atty., Herbert R. Alexander, Jr., Abbott J. Reeves, Asst. Dist. Attys., for plaintiff-appellee.

S. Austin McElroy, Covington, for defendant-appellant.

DENNIS, Justice.

The defendant, Robert Lee Willie, was convicted of first degree murder and sentenced to death. He appeals from his conviction and sentence, urging fifteen assignments of error.

On May 28, 1980, at approximately 4:30 a.m., Robert Lee Willie and Joseph Vaccaro offered a ride to the victim, Faith Hathaway, outside of the Lakefront Theatre, a disco in Mandeville, Louisiana. Miss Hathaway, an 18 year old woman, had been celebrating her last night as a civilian before entering the United States Army. Instead of taking the victim to her home in St. Tammany Parish, as she had requested, Willie and Vaccaro took Hathaway to Fricke's Cave, a heavily wooded, secluded gorge south of Franklinton in Washington Parish. Willie or Vaccaro, or both, raped the young woman there. Afterwards, one of the men repeatedly stabbed the victim in the throat while the other held her hands. Hathaway's clothes and purse were found approximately one hundred fifty yards from her body on June 1st, 1980. Her body was discovered on June 4, 1980.

On June 3, 1980, Willie and Vaccaro were arrested in Hope, Arkansas for unrelated crimes of aggravated rape, aggravated kidnapping and attempted murder committed against persons other than Hathaway. On June 10, 1980, both defendants admitted to police officers that they seized Hathaway but each accused the other of raping her and slashing her throat.

A. TRIAL OF GUILT OR INNOCENCE

ASSIGNMENTS OF ERROR NOS. 1 and 2

[1–3] The defendant contends that the trial court erred in failing to order a venue change pursuant to La.C.Cr.P. arts. 621 et seq. In rejecting the motion for a change of venue, the trial court apparently found that the defendant failed to carry his burden of proving "that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending." La.C.Cr.P. art. 622; *State v. Bell*, 315 So.2d 307 (La.1975).[1] Although

1. A number of factors must be considered in determining whether to change venue. As this court noted in *State v. Bell*,

> Some relevant factors in determining whether to change venue are (1) the nature of pretrial publicity and the particular degree to

the trial court possesses a broad range of discretion in this area, see, e.g., *State v. Adams*, 394 So.2d 1204 (La.1981); *State v. Felde*, 382 So.2d 1384 (La.1980); *State v. Sonnier*, 379 So.2d 1336 (La.1980), we are required to make an independent evaluation of the facts to determine whether the accused received a fair trial, unfettered by outside influences. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In our review, however, we have the benefit of a completed trial record. The record demonstrates that counsel for the defendant conducted a thorough voir dire of the prospective jurors. Of the fifty-two prospective jurors, forty-seven had read or heard about the case. However, only ten of the fifty-two said they had formed any opinion as to the defendant's guilt or innocence. Four of those testified that they could set aside that opinion and render a verdict based on the evidence presented at trial. The court sustained challenges for cause as to those six who had formed an opinion but who were unable to lay their preconceived opinion aside. In addition, the defendant exercised his privilege of challenging twelve other prospective jurors peremptorily. We believe that the qualifications possessed by each selected juror met or exceeded the minimum requirement that "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1961). In the instant case, the jury selection procedure resulted in the seating of a jury consisting of five women and seven men. In addition, the jury verdict in Joseph Vaccaro's case, which was tried simultaneously and in the same parish, reflects some degree of discernment in assessing the evidence, since the jury recommended a penalty of life imprisonment without parole for Vaccaro, whose complicity in the crimes was equal to that of Willie insofar as it was reflected by the pretrial news coverage. The record shows that the great bulk of publicity consisted of straight news reporting, which occurred nearly two months before the trial. The extent to which governmental officials were responsible for the publication of objectionable matter about the case was minimal. The district attorney was quoted as stating that he would personally conduct the prosecution to make sure that "these two animals" would not walk the streets again. This prejudicial remark was very brief, however, and had probably lost whatever force it had by the time of trial. Although the crime was vile and outrageous, and was thoroughly covered by the area news media, it was not attended by other inflammatory factors such as racial strife, see *State v. Bell*, 346 So.2d 1090 (La.1977), murder of law enforcement officials, *State v. Felde*, 382 So.2d 1384 (La.1980) or an egregious event such as a televised confession. See *Rideau v. La.*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). On the contrary, the defendant and the victim were of the same race, and neither was a resident of the parish in which the crime occurred and the trial was held. From our independent review of the facts, we are convinced of the correctness of the trial court's ruling on this issue.

which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire. See, generally, Annotation, 33 A.L.R.3d 17 (1970).

ASSIGNMENT OF ERROR NO. 3

[4, 5] By this assignment defendant contends the trial court erred in denying his

Other factors we have indicated are relevant to this inquiry include:

"• • • The degree to which the publicity has circulated in areas to which venue could be changed, the care exercised and the ease encountered in the selection of the jury, the familiarity with the publicity complained of and its resultant effect, if any, upon the prospective jurors or the trial jurors, and the peremptory challenges for cause exercised by the defendant in the selection of a jury. *See, generally*, Annotation 33 A.L.R.3d 17 (1970)" *State v. Bell*, 346 So.2d 1090 (La.1977); *State v. Berry*, 329 So.2d 728 (La.1976).

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motion for sequestration of jurors during voir dire, although he permitted individual questioning of the prospective jurors. The manner in which the veniremen are called and the scope of the examination are left to the court's discretion. La.C.Cr.P. art. 784; Id. comment (c); art. 786. The burden is therefore on the defendant to show that the court misused its discretion in refusing to sequester the venire during voir dire. *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Berry*, 391 So.2d 406 (La.1980); *State v. Dominick*, 354 So.2d 1316 (La.1978). Because the defendant has failed to show any misuse of discretion, this assignment is without merit.

ASSIGNMENT OF ERROR NO. 4

[6] By this assignment defendant argues that the trial court erred in denying his motion for continuance filed four days before trial. Defense counsel was alloted one hundred nine days from his appointment and at least thirty-nine days from the fixing of the case for trial for preparation. He complains he received some amended discovery responses from the district attorney only four days before trial and that he was notified only one month before trial that the state would definitely try the murder case on that date as opposed to unrelated rape charges. Defendant has failed, however, to show how these inconveniences prevented adequate preparation for trial. Since it is within the trial court's discretion to grant a continuance and to judge if there is good ground therefore, La.C.Cr.P. art. 712, this assignment is without merit.

ASSIGNMENT OF ERROR NO. 5

[7] By this assignment defendant charges that the trial court erred in denying his motion to have him transferred to the Washington Parish or St. Tammany Parish jail four days before trial and during trial to facilitate the assistance of counsel in his defense. During the brief hearing on the motion, at which only arguments were presented, the trial judge was presented with these contentions: Defendant was incarcerated in a federal facility in New Orleans where he would be available to defense counsel on weekends and after hours. The Washington Parish jail was already filled to its maximum capacity. During trial the defendant was to be brought to Washington Parish for court each day and returned each night to New Orleans under guard by federal marshals. The travel time one way from defendant's place of incarceration to the courthouse was approximately two hours. The trial judge resolved the problem by assuring defense counsel that, in addition to having defendant made available to him in New Orleans, the court would arrange for further conferences if necessary before the defendant was returned to the federal penal facility on days during the trial. This is the type of question which appropriately lies within the trial court's discretion because of the impracticability of framing a rule of decision where many disparate factors must be weighed. See *State v. Talbot*, 408 So.2d 861 (La.1980) (on rehearing); *Noonan v. Cunard Steamship Co.*, 375 F.2d 69, 71 (2d Cir. 1967). The trial judge's solution to this particular problem appears to be reasonable, workable, and a proper exercise of his discretion. Defendant did not object during trial or present evidence that the procedure outlined by the trial court prevented adequate consultation with counsel. Accordingly, this assignment is without merit.

ASSIGNMENTS OF ERROR NOS. 6 and 7

[8] Defendant asserts that the trial court erred in making certain statements of law during the voir dire. Defendant further asserts that the trial court erred in not granting a mistrial as to these statements upon a defense motion to do so.

The trial judge made the following statements:

> Now if the state does prove in presenting their case guilt in your mind beyond a reasonable doubt, then you would legitimately expect something else, but it all depends on the state's proof, not on what the defense puts up .... what you weigh is the state's evidence. The state has the

burden. They present their case first, and if from the evidence which they have presented, they have failed to prove something that is necessary in order to obtain guilt, then at that time the defense has the right not to put on anything, just to rest on the inadequacy of the state's case....

What you're doing is weighing the state's case. You don't weigh the defendant's case until after you weigh the state's case. They have the burden to carry out proof. If they fail to do it, then he doesn't have to do anything, because of this rule of presumption of innocence, you see. Now, if they do it, you might expect something else. The first thing [defense counsel objects]..... The state has to prove its case beyond a reasonable doubt, and if you feel like they have not done that after they present their case, then he would be entitled to a verdict of not guilty; in other words, you weigh the evidence presented by the state before you expect anything. Can you do that?

You would not necessarily expect him to do anything, you would weigh the evidence of the case of the state as to what they presented.

La.C.Cr.P. art. 770, which codifies the jurisprudential rules with reference to prejudicial remarks that could form the basis of a mistrial, provides in pertinent part as follows:

Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:

* * * * * *

(3) The failure of the defendant to testify in his own defense;

* * * * * *

An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

The judge's remarks did not refer directly or indirectly to the failure of the defendant to testify in his own defense. It came dangerously close. But our careful scrutiny convinces us that the comment was intended to inform the jury that the state must prove the defendant's guilt beyond a reasonable doubt, regardless of whether the defendant presents any evidence, and that the average juror would not have inferred from it a reference to defendant's failure to testify. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 8

Defendant argues that the trial court erred in not granting the motion to suppress his confession. It is defendant's contention that the statement he gave to authorities was given involuntarily and in violation of his *Miranda* rights.

On June 3, 1980, Special Agent Lambert of the FBI and Lieutenant Duvall of the Arkansas State Police advised the defendant of his constitutional rights in Hope, Arkansas, after his arrest there on unrelated aggravated rape, aggravated kidnapping, and attempted murder charges. The defendant was not interviewed on that date because he refused to answer questions without a lawyer being present. On June 4, 1980, Willie was taken to Texarkana, Arkansas and again advised of his right to an attorney by a United States Magistrate, who read charges against him and set bond. The defendant waived his right to an attorney for purposes of that hearing and informed the United States Magistrate that he had an attorney in Louisiana but did not request his presence.

At the motion to suppress hearing, FBI agent Lambert testified that on June 11, 1980, he received a call from one of Willie's jailers informing him that on June 9, 1980, the defendant had requested to speak to Lambert. On June 10, 1980, Investigator Michael Varnado of the Washington Parish District Attorney's Office and Sergeant Donald Sharp of the St. Tammany Parish Sheriff's Office interviewed Willie at the

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jail in Texarkana, Arkansas regarding the Hathaway murder and rape. Sergeant Sharp testified that, before the interview, he fully advised Willie of his constitutional rights and that the accused expressly stated that he did not want the assistance of an attorney. Willie was then informed that his co-defendant, Vaccaro, had just given an oral statement to Varnado and Sharp in connection with the Hathaway murder. Investigator Varnado informed the defendant that his mother had been arrested for harboring him but that in his opinion the charges would be dismissed if further investigation revealed they had no merit. Nevertheless, the officers testified that no promises of any kind were made to the accused. Willie gave them an oral statement and a tape recorded statement which he signed after it was transcribed. Willie did not testify at the motion to suppress hearing or present any evidence to controvert the officers' testimony.

These events raise the questions of (1) whether Willie knowingly, voluntarily and intelligently waived his right to counsel and his privilege against self-incrimination; and (2) whether his confession was free and voluntary.

[9, 10] The United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), set forth procedures to insure that an individual subject to custodial police interrogation is accorded his privilege under the Fifth Amendment not to be compelled to incriminate himself. These included the following: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[2] Unless other fully effective measures are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be informed that he has a right to remain silent, that any statement he does make may be used in evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. "If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* 384 U.S. at 444, 86 S.Ct. at 1612. At another point in the opinion, the court declared, "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474, 86 S.Ct. at 1627.

Article I § 13 of the 1974 Louisiana Constitution requires that any person arrested or detained in connection with the investigation or commission of any offense must be advised fully of the reasons for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. By the adoption of this provision, Louisiana enhanced and incorporated the prophylactic rules of *Miranda v. Arizona*. *In Re Dino*, 359 So.2d 586 (La.1978).

[11, 12] In *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the high court made clear that when an accused has invoked his right under *Miranda* to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. An accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

2. By custodial interrogation the Supreme Court meant questioning initiated by law enforcement officials after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, 384 U.S. at 444, 86 S.Ct. at 1612; *State v. Menne*, 380 So.2d 14 (La.1980).

communication, exchanges or conversations with the police. Ibid.

Six months before the decision in *Edwards v. Arizona*, this court, in *State v. Thucos*, 390 So.2d 1281 (La.1980), reached a similar conclusion. In that case we held that after an accused invoked his right to have counsel present during custodial interrogation, the police failed in their duty to scrupulously honor his right when they initiated further questioning shortly after his request for counsel. The accused did not have an attorney present although he had not withdrawn his request for one.

[13, 14] Although the per se rule against further interrogation after a request for counsel appears at first blush to have direct application in the present case, we conclude that it is inapposite after careful examination of the reasons underlying *Miranda*. First, in announcing the procedural safeguards, the *Miranda* court declared they were to be employed "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it...." 384 U.S. at 444, 86 S.Ct. at 1612. The court noted that Rule 5(a) of The Federal Rules of Criminal Procedure, and its effectuation of that rule in *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), and *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), requiring production of an arrested person before a commissioner without unnecessary delay and excluding evidence obtained in default of that statutory obligation, were responsive to the same considerations of Fifth Amendment policy that faced the court in *Miranda* as to the States. Since Willie was brought before a federal magistrate who informed him of his rights and offered to appoint counsel for him in compliance with the supervisory rules, his privilege under the Fifth Amendment was protected by "other effective means" as required by *Miranda*. Second, *Miranda* is not to be read to impose an absolute ban on resumption of questioning at anytime or place on any subject. See, *Michigan v. Mosley*, 423 U.S. 96, 115, 96 S.Ct. 321, 332, 46 L.Ed.2d 313, 328 (1975) (Brennan, J., dissenting). For example, in discussing the *Westover* case, the *Miranda* court indicated that improper interrogation by one law enforcement agency would not necessarily bar questioning about a different crime by a legally distinct authority.[3] 384 U.S. at 496, 86 S.Ct. at 1639. Also, the high court cited with approval the FBI practice of terminating interviews upon receiving a request for counsel except "as to all matters *other* than the person's own guilt or innocence." 384 U.S. at 485, 86 S.Ct. at 1633. Finally, under the unique circumstances of this case, Willie's refusal to answer the FBI agent's questions about federal crimes without an attorney should not be construed as a per se invocation of his Fifth Amendment rights as to independent state offenses requiring all interrogation as to the latter to cease. The *Miranda* court sought to formulate protective devices to dispel the compulsion inherent in custodial interrogations, which have largely taken place incommunicado. 384 U.S. at 457, 86 S.Ct. at 1618. There is no indication in the record that Willie was held incommunicado. When he asked not to be questioned without an attorney about the federal crimes by the FBI agent, his right was scrupulously honored. There was no reason for him to believe the Louisiana officials would behave differently. He was specifically asked by the state officers if he wanted an attorney present and he expressly waived this right. By the time the state officers approached Willie, one week had elapsed since the FBI agent attempted to interview him, Willie had been removed from his original surroundings, he had appeared before a federal magistrate, and he had voluntarily sign
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3. "We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." 86 S.Ct. at 1639.

had voluntarily signalled his willingness to discuss his crimes with law enforcement authorities. For all of these reasons, we conclude that Willie was under no pressure to answer questions about the state crimes without the presence of an attorney, but that he did so knowingly and intelligently after being fully advised of his rights and given an opportunity to exercise them.

Moreover, even if the *Edwards v. Arizona* rule is applicable here, after Willie first refused to answer questions by the FBI agent without the presence of counsel, he himself initiated further communications with both federal and state law enforcement officials. Although the evidence indicates he initially asked to talk to the FBI agent, the record contains no suggestion that he was in any way reluctant to talk to all law enforcement officials.

The general rule is that, on the trial of a motion to suppress, the burden of proof is on the defendant to prove the grounds of his motion. La.C.Cr.P. art. 703(D). One exception to the rule is that the State has the burden of proving beyond a reasonable doubt the voluntariness of a confession which the defendant has moved to suppress as evidence at the trial on the merits. La.C.Cr.P. art. 703(D); La.R.S. 15:451; *State v. Glover*, 343 So.2d 118 (La.1977); *State v. Johnson*, 363 So.2d 684 (La.1978); *State v. Bouffanie*, 364 So.2d 971 (La.1978); *State v. Volk*, 369 So.2d 128 (La.1979); *State v. Jones*, 376 So.2d 125 (La.1979). In reviewing the trial judge's ruling as to the admissibility of a confession, his conclusions on credibility are entitled to the respect due those made by one who saw the witnesses and heard them testify. *State v. Bouffanie, supra.*

[15] In the present case, Willie did not testify at the suppression hearing or trial. Each law enforcement officer who testified stated that no promises, threats, or coercion of any kind was used on Willie. Investigator Varnado informed Willie that in his opinion, if the charges aginst Willie's mother were without merit, they would be dismissed. However, Varnado testified that he made no promises to Willie.

Willie was in jail for one week prior to his giving of the statement. It is uncontradicted, however, that no authorities questioned him during this time. Before Willie confessed, he had been advised of his rights on at least three occasions, a federal magistrate had offered to appoint an attorney for him, and he had declined stating that he had a lawyer in Louisiana. It does not appear from the evidence that Willie's will was overborne. His inculpatory statement appears to have been made freely and voluntarily. Accordingly, this assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 9 and 10

Defendant argues that the trial court erred in finding that the State proved the corpus delicti of the crime charged to such a degree that the jury could find that the corpus delicti had been proven beyond a reasonable doubt. Based upon this alleged error, the defendant urges that the trial court also erred by admitting into evidence the defendant's confession.

[16–18] It is well settled that an accused party cannot be legally convicted on his own uncorroborated confession without proof that a crime has been committed by someone; in other words, without proof of the corpus deliciti. *State v. Ashley*, 354 So.2d 528 (La.1978); *State v. Mullins*, 353 So.2d 243 (La.1977); *State v. Freetime*, 334 So.2d 207 (La.1976); *State v. Sellers*, 292 So.2d 222 (La.1974); *State v. Brown*, 236 La. 562, 108 So.2d 233 (1959); *State v. Calloway*, 196 La. 496, 199 So. 403 (1940); *State v. Morgan*, 157 La. 962, 103 So. 278 (1925). The corpus delicti must be proven by evidence which the jury may reasonably accept as establishing that fact beyond a reasonable doubt. *State v. Carson*, 336 So.2d 844 (La.1976); *State v. Brown, supra; State v. Morgan, supra.* In a prosecution for murder, before there can be a legal conviction, the death of the person alleged to have been killed, together with the criminal agency of someone as the cause of the death, must be established beyond reasonable doubt. *State v. Gebbia*, 121 La. 1083, 47 So. 32 (1908).

[19] Although the body of the deceased was partially decomposed upon its discovery, the death of Faith Hathaway was firmly established by the evidence. The medallion found around the neck of the victim by Dr. McGarry, the pathologist who performed the autopsy, was matched to a photograph of Hathaway wearing the medallion. Other items of evidence found near the body of the victim were identified as her belongings, including her driver's license and birth registration card. The victim's uncle, Dr. Donald Trewick, a dentist, inspected the body, compared the deceased's dental restorations with Faith Hathaway's dental records. He concluded that the teeth he examined at the funeral home were Faith Hathaway's teeth.

Dr. McGarry, who performed the autopsy, testified that he felt that a large slash-like opening in the soft tissues in the front of the neck extending all the way across the neck was probably the fatal wound. He also concluded that a deep wound of the right hand was probably due to an attempt at defense against the wound in the neck. A vaginal laceration indicated to him that forceful intercourse had taken place at about the same time. The evidence further established that Hathaway's nude body was found in a remote area and that no object which could have caused the wounds was found at the scene. This evidence established beyond a reasonable doubt that Faith Hathaway's death was caused by the criminal agency of someone. Hence, the corpus deliciti was established independently of defendant's confession, and these assignments of error have no merit.

ASSIGNMENTS OF ERROR NOS. 11, 12 and 13

After both the State and the defendant rested their cases, the defendant moved for a mistrial contending that the prosecution had in its possession a note found at the scene of the crime which may have constituted exculpatory evidence which the State failed to disclose in response to a general *Brady* request. The court denied the motion. Defense counsel asked the judge, "Would you inspect it?" The trial court replied that he would inspect and consider it on a motion for a new trial. Defense counsel did not specifically request an inspection of the note or move the court to order the district attorney to produce it for inspection by the defendant or the court.

In brief in this court the state and the defendant assert that the note contains the words "you will never catch us" or "you never find her." The prosecution contends that the note was discovered three days after the body was found, that it was probably left by a prankster, and that it constitutes neither inculpatory nor exculpatory evidence.

[20] The defendant's right to be protected against the prosecution's failure to disclose exculpatory evidence is founded upon the due process clause and is designed to assure a fair trial and not to deter prosecutorial misconduct. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); 8 Moore's Federal Practice § 16.06 (2d ed. 1981). *In United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Supreme Court set forth three categories of cases to which *Brady* arguably applies and enunciated standards for each category.

[21] The first category is illustrated by *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), and includes cases in which the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecutor knew, or should have known, of the perjury. A strict standard of materiality is applied in such cases and a conviction obtained by the knowing use of perjury must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury". *United States v. Agurs*, *supra* 427 U.S. at 103, 96 S.Ct. at 2397.

[22] The second category of cases, typified by *Brady* itself is characterized by a pretrial request for specific evidence. The standard for materiality in such cases is whether the suppressed evidence "might have affected the outcome of the trial."

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[23] The third category of cases consists of those in which a general request ("all *Brady* materials") or no request at all is made. A conviction will be overturned, in such cases, if the omitted evidence creates a reasonable doubt that did not otherwise exist. The omission must therefore be evaluated in the context of the entire record.

> If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. at 112–13, 96 S.Ct. 2401.

[24] In the instant case there was no specific pretrial request for the undisclosed evidence. Even if we construe the defense counsel's motion for a mistrial as a specific request for the evidence, it did not come until after both parties had rested their cases. Accordingly, this case falls in the third category and presents the question of whether the omitted evidence creates a reasonable doubt that did not otherwise exist.

The defendant reurged this assignment of error in his motion for a new trial. The motion was denied, however, and apparently without affording defendant an opportunity to inspect and analyze the note or to make a showing that "the defense might have made effective use of the [note] at the trial or in obtaining further evidence". *Giles v. Maryland*, 386 U.S. 66 at 74, 87 S. Ct. 793 at 797, 17 L.Ed.2d 737. See, *State v. Henderson*, 362 So.2d 1358 (La.1978); 8 Moore's Fed. Practice § 16.06[3] p. 16–137.

Because defendant has never been given such an opportunity, and because the note is not part of the record in this case, we will remand the case to the trial court for it to determine, in the light of this opinion, whether the note, used as evidence or otherwise at trial, or further evidence gained from the note's inspection and analysis, would, upon its evaluation in the context of the entire record, create a reasonable doubt as to the defendant's guilt.

ASSIGNMENT OF ERROR NO. 14

By this assignment defendant argues that the trial court erred in denying his motion for a new trial. The motion is based for the most part on the 13 preceding assignments of error with which we have already dealt. Accordingly, we pretermit further discussion of them.

Additionally, the defendant moved for a new trial on the ground that the court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error, viz., (1) the court's denial of defendant's motion to quash the indictment, (2) its failure to restrain the district attorney from using prior convictions on cross examination, (3) and its refusal to give jury charges requested by defendant.

[25] The defendant's motion to quash the indictment included allegations regarding alleged irregularities in the grand jury proceedings. No evidence was provided to substantiate these allegations. The defendant also asserted that the indictment failed to charge an offense which is punishable under a valid statute in that Louisiana's first-degree murder statute, La.R.S. 14:30, provides for cruel and unusual punishment. We find no error in the trial court's denial of defendant's motion to quash. Cf. *State v. Payton*, 361 So.2d 866 (La.1978).

[26] Defendant urged, in his motion for a new trial, that the trial court erred in not granting his motion to restrain the district attorney from using prior convictions on cross examination. It was argued that Robert Willie would be inhibited from testifying in his own behalf unless the court were to restrain the district attorney from using prior convictions to impeach Willie's credibility. We find no error in the trial court's denial of this motion. La.R.S. 15:495; *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); *State v. Prather*, 290 So.2d 840 (La.1974).

[27] The defendant argued that the trial court erred in its refusal to give requested

jury charges numbers two and three. The substance of special jury charges numbers two and three was included in the general charge and the charges were superfluous. La.C.Cr.P. art. 807.

Consequently, we find that the trial court did not err in denying defendant's motion for a new trial.

ASSIGNMENT OF ERROR NO. 15

Defendant argues that an error patent on the face of the record might require reversal of the conviction. No specific error patent is alleged. A review of the record shows no errors patent. Accordingly, this assignment lacks merit.

B. THE PENALTY TRIAL

[28] In the penalty phase of the case, the prosecuting attorney presented two arguments to the jury which created a reasonable possibility that the death sentence was imposed under the influence of passion, prejudice or arbitrary factors. Essentially these arguments urged the jury to impose the death penalty to prevent the defendant from receiving a pardon or commutation and encouraged the jury to view its selection of the penalty as a tentative one subject to change by numerous reviewing courts.

1. Argument as to Governor's powers of pardon and commutation:

The prosecuting attorney presented the following argument to the jury:

> "* * * Mr. McElroy said that the rest of his life behind bars with no parole, no probation, no suspension of sentence would be enough for Mr. Willie in this case, but once again let's look at things in a hard, cold light of reality and tell you the truth. He's right. The statute does say no probation, no parole, no suspension of sentence, but have you ever heard of pardon, commutation? Those are two things that are given to the governor of the State of Louisiana in the Constitution of the State of Louisiana and it can't be taken away by statute. As a result, the governor, whoever is the governor, eight, ten, twelve years from now, twenty years from now, can take it upon himself to let Robert Lee Willie back out onto the streets and back out into society, because that governor more than likely will not know the facts of this case. So don't think that life really ever means life, because it doesn't. * * *"

By this argument, the jury was informed that a sentence of life without benefit of parole would not protect society from a dangerous criminal because (1) the Governor may commute sentences and pardon those convicted; (2) a future governor considering clemency in a particular case likely will not know the facts of the case; and (3) in practice, a life sentence is never carried out. The prosecuting attorney's argument that the death penalty should be imposed to avoid the defendant's almost certain release through an ill considered pardon or commutation was highly prejudicial. It called on the jury to base its decision on a consideration outside the scope of its authority and referred to facts upon which no evidence had been introduced.

The trial court did not instruct the jury to disregard the argument or the inaccurate and misleading information it contained.

[29, 30] The constitutionality of any death penalty scheme depends on whether the jury's discretion is channeled and guided by clear, objective and specific standards. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). A capital punishment procedure which leaves to the jury's unbridled discretion the selection of those defendants who shall receive the death sentence will be struck down. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Accordingly, the statutes under which defendant's death sentence was imposed were based on those approved by the United States Supreme Court as providing adequate standards to guide the jury in selecting those among first degree murderers who should receive the death penalty.

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[31] The legislat penalty scheme is hearing must focus the offense and the ties of the offender. The sentence will without parole, prot sentence unless the and beyond a reason statutorily defined stance." La.C.Cr.P found a statutory stance, the jury is r dence of any mitiga to weigh it against ing circumstance(s) mending the more ther a penalty of life parole or a senten *Sonnier*, 402 So.2d 6

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[31] The legislative aim of our death penalty scheme is clear. The sentencing hearing must focus on the circumstances of the offense and the character and propensities of the offender. La.C.Cr.P. art. 905.2. The sentence will be life imprisonment without parole, probation, or suspension of sentence unless the jury finds unanimously and beyond a reasonable doubt at least one statutorily defined "aggravating circumstance." La.C.Cr.P. art. 905.3. Having found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance(s) so found, before recommending the more appropriate penalty, either a penalty of life imprisonment without parole or a sentence of death. *State v. Sonnier*, 402 So.2d 650, 657 (La.1981).

An argument based on the law governing pardon and commutation or its administration by the governor and other executive officers is entirely inappropriate to a capital sentencing proceeding. Only evidence relevant to a statutorily prescribed aggravating circumstance, a mitigating circumstance, or the character and propensities of the offender is properly admissible at such a hearing. La.C.Cr.P. arts. 905.2, 905.4, 905.5. The capital sentencing hearing must be conducted according to the rules of evidence and, insofar as applicable, the code of criminal procedure. La.C.Cr.P. art. 905.2. Consequently, the argument at a sentencing hearing may not appeal to prejudice and must be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. La.C.Cr.P. art. 774. Since the law of pardon and commutation was not applicable to the case and evidence pertaining to the governor's exercise of these powers was inadmissable, the prosecuting attorney's argument erroneously and prejudicially exceeded its proper scope.

There is more at issue in this case, however, than whether prosecuting attorneys and trial courts must follow statutory rules of evidence and procedure. The injection of pardon and commutation questions into a sentence proceeding tends to skew the legislature's constitutionally sound death penalty scheme. Jurors are thereby encouraged to consider the vicissitudes of executive clemency instead of the clear, objective, and specific standards enacted for the purpose of channeling their discretion. Although the jury has no constitutional oversight of executive policy, it is impelled, although ill equipped, to predict and pass judgment on future pardon and commutation practices. The substitution of this conundrum for the clear, objective statutory standards encourages the jury to exercise unbridled discretion reminiscent of the latitude found constitutionally objectionable by the United States Supreme Court in our former statute. *Roberts v. Louisiana*, *supra*.

[32] For these reasons and others, this court has held that conditions under which a person sentenced to life imprisonment without benefit of parole can be released at some time in the future are not a proper consideration for a capital sentencing jury and shall not be discussed in the jury's presence. Further, in reviewing a capital case in which an offender's potential for future release has been injected into the proceedings by the state or the trial court, this court must presume that a death sentence was imposed under the influence of an arbitrary factor unless the record clearly indicates that the jury was properly informed of its duty and admonished to disregard the improper remarks, and the record indicates that the jury heeded the admonition. *State v. Lindsey* 404 So.2d 466 (La. 1981). See also, *State ex rel., Williams v. Blackburn*, 396 So.2d 1249 (La.1981); *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Sonnier*, 379 So.2d 1336, 1364 (La.1979) (Dennis, J., concurring in part and dissenting in part); *State v. Sonnier*, *supra* at 1368 (on rehearing).

In a thorough consideration of this problem in *State v. Lindsey*, supra, this court

noted the legal and practical considerations which weigh against the discussion of pardon or commutation in the jury's presence: to accurately inform jurors of probabilities of release and applicable time frames would create a whole new phase of sentencing and divert the jurors from their primary responsibility. The Code of Criminal Procedure does not provide for jury consideration of an offender's future potential for release. Speculation as to the actual length of a life sentence is not even remotely related to the statutorily prescribed sentencing standards, viz., the circumstances of the offense, and the character and propensities of the offender. The interjection of pardon and commutation issues provokes questions that no human mind can answer and in substance transposes the task of the governor to the jury. In this latter respect it induces the jury to pass judgment upon the very issue entrusted only to the governor and could prevent him from deciding the issue at the proper time.

Applying these precepts to the present case, it is clear that the sentence must be set aside and that a new penalty hearing must be held. The prosecuting attorney explicitly asked the jury to assume that Willie would be pardoned or have his sentence commuted in considering whether he should live or die. Furthermore, he compounded his prejudicial remarks by inaccurately stating that a future governor considering Willie's application for pardon or commutation would more than likely not know the facts of the case and by his misleading assertion that a life sentence never exacts lifetime imprisonment. The trial court gave no admonition or instruction which would dispell any of the effects of this improper, erroneous and misleading argument.

2. Presentation of Argument as to Appellate Review of Death Sentences

The prosecution further argued:

> The other thing is a lot of times people would like to think let jurors think the buck stops with you. The buck stops with you. After this, there ain't no review. You all come back with the death sentence, he's going to the chair. Ladies and gentlemen of the jury, every word that has been said during the course of this trial, every piece of evidence that has been entered into the record during the course of this trial, all the motions that were filed and heard prior to this trial, and everything will more than likely be reviewed by every appeals court in this state, including the Supreme Court of this state. It has to go to them, as a matter of fact, by law, and once that's over, then the federal appeal begins, both in the district courts, the federal district courts, the federal appellate courts, and the Supreme Court of the United States of America, before anybody is put in the chair. So the buck really don't stop with you. The buck starts with you, because without the death penalty, then they won't have all those reviews to determine whether his trial was conducted properly, he got a fair trial, he got a fair hearing, and a jury of twelve people after hearing the evidence and the testimony decided that his man, this man, had forfeited his right to live in society with the rest of us, and he has done exactly that. Forfeited his right, because of what he and Joe Vaccaro did. So what I'm asking you to do is start the buck rolling. Let's find out whether we conducted this trial properly, and let's come back with a sentence that Robert Lee Willie deserves, and that's death in the electric chair. Thank you.

[33] A prosecutor's argument conveying the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, or which contains inaccurate or misleading information, deprives the defendant of a fair trial in the sentencing phase and requires that the death penalty be vacated. *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Berry*, 391 So.2d 406 (La.1980); *Id.* at 419 (Calogero, J. dissenting to denial of rehearing).

[34] In the present case, the prosecuting attorney told the jurors that: (1) the "buck," i.e., the responsibility for the death sentence, doesn't st
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sentence, doesn't stop with them: it starts with them and is passed on to a series of courts; (2) "everything" will more than likely be reviewed by "every appeals court in the state," the state supreme court, the federal district court, the federal appellate courts, and the United States Supreme Court.

This type of argument may not be made in a criminal case in which the punishment may be capital. Jurors should approach the task of finding facts and exercising discretion as to choice of penalty with appreciation that their duties are serious and that they are accountable for their decisions, not with the feeling that they are making mere tentative determinations which the courts can correct. An argument improperly diminishes the jury's duty and responsibility if it implies that a reviewing court can substitute its judgment as to choice of punishment or that the decision of whether the sentence of death is appropriate is not entirely the jury's responsibility.

In addition to implying that the jury's decision is a tentative one, the prosecuting attorney's remarks were misleading as to the number of courts which would review the case and as to the nature of each judicial review. Contrary to the impression conveyed, no court will reweigh the evidence and make a de novo determination of whether death is the appropriate penalty. Further, only this court can review the case on direct appeal; certainly not "every appeals court in the state", since their jurisdiction is presently limited to civil and juvenile matters. Finally, any review by a federal court, including the United States Supreme Court, is solely within its discretion and, if it occurs, is apt to center on legal questions far removed from the question of the appropriate penalty which the jury is called upon to decide.

In view of the foregoing, this court would be called upon to vacate the sentence and order a new penalty hearing even in the absence of the other improper, misleading and inaccurate argument discussed initially.

DECREE

Accordingly, the Defendant's conviction is affirmed but his sentence is vacated. The case is remanded to the trial court for it to determine whether the undisclosed note, or evidence which could be obtained therefrom, would, upon its evaluation in the context of the entire record, create a reasonable doubt as to the defendant's guilt. Should the trial court find that such a reasonable doubt exists after its evidentiary hearing, a new trial will be required. If the trial court finds, after an evaluation as described, that there is no reasonable doubt as to the defendant's guilt, the conviction will be affirmed[4] and a new jury shall be impanelled to determine only the issue of penalty in accordance with the procedure set out in La.C.Cr.P. art. 905.1(B).

CONVICTION CONDITIONALLY AFFIRMED; SENTENCE VACATED; REMANDED.

MARCUS, J., concurs in part and dissents in part and assigns reasons.

WATSON, J., concurs in the conditional affirmance of defendant's conviction but dissents from the reversal of sentence.

LEMMON, J., concurs and will assign reasons.

MARCUS, Justice (concurring in part and dissenting in part).

I concur in the affirmance of defendant's conviction subject to the remand but dissent from the reversal of his sentence because of certain comments made by the prosecutor during rebuttal argument. In the first place, defendant failed to object to the statements at the time of the occurrences. Moreover, even in the event of improper argument, a verdict should not be set aside unless it is clear that the jury was influenced by the remarks and that they contributed to the verdict. *State v. Simms*, 381

4. The proceedings and determinations of the trial court will be subject to review by this court on appeal.

So.2d 472 (La.1960); *State v. Lockett*, 332 So.2d 443 (La.1976). I do not consider that such was the case here.

LEMMON, Justice, concurring.

I agree that the conviction should be affirmed, but that the death penalty must be set aside because of the prosecutor's speculative comments on the possible effects of a gubernatorial pardon if the jury recommended a sentence of life imprisonment.[1]

I do not subscribe, however, to the majority's characterization of the prosecutor's comments on appellate review of the death sentence in this case as "implying that the jury's decision is a tentative one", nor do I subscribe to any suggestion that such comments necessarily tend to lessen the jury's awesome responsibility.

As this court pointed out in *State v. Berry*, 391 So.2d 406 (La.1980), comments on appellate review of the death sentence should be approached very cautiously, because they may convey a faulty impression of the jury's critical role in the assessment of penalty in capital cases. However, this court has not adopted (and should not adopt) a "per se rule" that any reference to appellate review of the jury's recommended sentence defeats the defendant's right to a fair penalty trial.

Speaking generally, I see nothing wrong with a prosecutor's accurate description of the safeguards provided by law against an arbitrary imposition of the death penalty and of the jury's role in the overall scheme of determining and imposing capital punishment. The issue in each case must therefore be whether a prosecutorial comment on appellate review of the death penalty is inaccurate, misleading or otherwise unfairly prejudicial[2].

Apparently, the comments on appellate review in this case were not made in such a way as to be manifestly prejudicial to the defendant, since the defense attorney did not object during the argument.[3] While I would not hesitate to reverse a death sentence when unfairly prejudicial comments are made without objection, I view the lack of objection as an indication of the context and "courtroom atmosphere" within which the comments were made.[4] I further note that the trial occurred prior to this court's decision on rehearing in *State v. Berry*,

1. For an earlier discussion by this court of improper prosecutorial reference to the possibility of gubernatorial pardons in capital cases, see *State v. Johnson*, 151 La. 625, 92 So. 139 (1922); *State v. Lindsey*, 406 So.2d 466 (La. 1981)

2. In *State v. Berry*, above, this court, while warning prosecutors of the dangers of such comments, said:

"[V]irtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and this court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard his responsibility. The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made." 391 So.2d at 481.

3. The prosecutor in this case was not precisely accurate in his references to review by "every state appeals court" or to appeals (rather than discretionary review) in the federal system. Nevertheless, I do not believe that the comments on judicial review served to induce a juror to disregard his responsibility or to lessen the juror's appreciation of the significance of his role in the overall scheme of capital punishment.

4. The "contemporaneous objection rule" is no bar to this court's review of capital sentencing hearings to determine whether fundamental unfairness so infected the proceedings as to require remand for a new penalty hearing. See *State v. Sonnier*, 379 So.2d 1336 (La.1980). However, not all "improperly admitted if objected to" matters require reversal under this court's approach in *Sonnier*. Only such occurrences (whether in the form of remarks by the prosecutor, comments by the judge, testimony by witnesses or procedural irregularities) which are so flagrantly prejudicial as to undermine the fundamental fairness of the jury's recommendation fall within this judicially recognized category of "plain error". See Fed.R. Crim.P. 51 and 52. Thus, although not dispositive of the question of this court's authority to review the alleged error, the failure of counsel to object will (at least for this member of this court) be a very significant indication of either trial strategy or of counsel's determination that the occurrence was not unduly prejudicial when taken in context.

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STATE

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No. 81
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PER CURIAM.

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La.C.Cr.P. Art. 894

above, which first questioned the prosecutor's comments on appellate review of a death sentence.

STATE of Louisiana

v.

Joseph Earl MAYFIELD.

No. 81-KA-1722.

Supreme Court of Louisiana.

Feb. 5, 1982.

Appeal from the 27th Judicial District Court, Parish of St. Landry; Isom J. Guillory, Jr., Judge.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Morgan J. Goudeau, Jr., Dist. Atty., Robert Brinkman, Asst. Dist. Atty., for plaintiff-appellee.

Sherman Stanford, Opelousas, for defendant-appellant.

PER CURIAM.

On March 19, 1981, defendant Joseph Earl Mayfield was charged by bill of information with two counts of forgery, in violation of La.R.S. 14:72. A six-member jury subsequently convicted the accused on both counts and the trial judge sentenced him to serve consecutive terms of five years' imprisonment on each count. Defendant now appeals his conviction and sentence to this Court, relying on the two assignments of error filed below.

We have reviewed defendant's assignment concerning alleged trial error and have found it to lack substance. Defendant's remaining assignment challenges the trial court's imposition of consecutive terms as excessive, La.Const. 1974, Art. 1, § 20, and inadequately supported by the trial court's statement of sentencing reasons. La.C.Cr.P. Art. 894.1; *State v. Ortego*, 382 So.2d 921 (La.1980). Finding merit in the latter contention, we vacate the sentence imposed and remand for resentencing.

CONVICTION AFFIRMED: SENTENCE VACATED AND CASE REMANDED.

STATE of Louisiana

v.

Lionel BUCHANAN.

No. 82-K-0266.

Supreme Court of Louisiana.

Feb. 19, 1982.

Re: Lionel Buchanan, applying for writ of Certiorari, Prohibition and Mandamus, Parish of Orleans, Number 286-398 "B".

Denied.

DIXON, Chief Justice concurs in the denial, assuming that the trial judge did not "refuse to accept the Motions to Suppress", and that they were actually filed. C.Cr.P. provides that an evidentiary hearing on a motion to suppress shall be held only when the defendant alleges facts that could require the granting of relief.

DENNIS, Justice dissents from the order denying the application. The application is ambiguous. However, if the district court refused to allow the filing of the motion it was in error. There is no requirement that the motion be particularized in order to file. La.C.Cr.P. Art. 708 (A)-(D). If the district court dismissed the motion simply because it was not particularized, this was error also. An evidentiary hearing shall be held only when the defendant alleges facts that require granting of relief Art. 703(E). Thus, the trial court would have been justified in refusing to conduct a hearing but not in dismissing the motion.

the men decided not to participate in the appeal. The commissioner found that respondent did not file the appeal or any other pleadings on behalf of the remaining clients, nor did he respond to their attempts to communicate with him after April of 1977 or refund any of the fee.

The commissioner concluded that respondent had violated DR 7-101(A)(2) by failing to carry out a contract of employment and DR 1-102(A)(1), (4), (6) by engaging in conduct involving misrepresentation.

Respondent testified that he had quoted the clients a fee of $6,000 and had only been paid about $3,000. He asserted that he earned the partial fee by reviewing the voluminous file while awaiting payment of the balance of the fee, and he further testified that he notified the clients that their appeal lacked merit, offering to meet with them and explain further. He admitted, however, that he never directed a letter to the clients advising that he was not proceeding with the appeal.

After reviewing the record, we conclude the respondent collected a fee in excess of $3,000, but did not file the appeal or give appropriate notice to his clients that he was not going to pursue the matter, thereby causing them to lose their appeal rights. We further conclude that respondent failed to communicate and discuss the matter with his clients or to return the fee.

[1] In overall mitigation, respondent argues that all four complaints were lodged within a short period of time and were the first against him since he began the practice of law in 1971. He further points out that he gave up his private practice in 1979. Finally, he argues that his professional conduct did not fall below the minimum standard required by the disciplinary rules and that suspension is unwarranted by the facts.

[2] The purpose of attorney disciplinary proceedings is not primarily to punish the lawyer, but rather to maintain appropriate standards of professional conduct in order to safeguard the public, preserve the integrity of the legal profession, and to deter other lawyers from engaging in violations of the Code of Professional Responsibility. *Louisiana State Bar Ass'n. v. Causey*, 398 So.2d 88 (La.1980). We agree with the commissioner's findings that respondent violated DR 6-101(A)(3) by neglecting legal matters entrusted to him, DR 7-101(A)(2) by failing to carry out contracts of employment, and DR 1-102(A)(4) by engaging in misconduct involving misrepresentation. Failing to perform legal services for which an attorney has been paid, allowing a client to lose his right of appeal because of inaction, and misrepresenting the status of litigation by blaming the judicial system for delays are serious violations which warrant suspension from practice.

Accordingly, it is ordered that Hilliard J. Fazande, II be suspended from the practice of law in the State of Louisiana for a period of thirty months, effective upon the date of the finality of this decree. All costs of this proceeding shall be paid by the respondent.

STATE of Louisiana

v.

Robert Lee WILLIE.

No. 81-KA-0242.

Supreme Court of Louisiana.

June 27, 1983.

Rehearing Denied Sept. 1, 1983.

Defendant was convicted before the Twenty-Second Judicial District Court, Parish of Washington, Hillary J. Crain, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, 410 So.2d 1019, conditionally affirmed conviction, vacated sentence, and re-

manded. On remand, the Twenty-Second Judicial District Court, Parish of Washington, Hillary J. Crain, J., found that certain printed note discovered near murder scene did not create reasonable doubt as to defendant's guilt and, after new sentencing hearing, imposed death sentence. Defendant appealed. The Supreme Court, Watson, J., held that: (1) evidence was sufficient to warrant finding that crime was committed "in an especially heinous, atrocious or cruel manner," without need for further definition of that statutory phrase by the trial court; (2) requested special charge as to liability for one who aids and abets in commission of first-degree murder, was not wholly correct statement of law and it was not error for the trial court to refuse to give the charge; and (3) death sentence was not cruel and unusual, excessive, or influenced by passion, prejudice, or any other arbitrary factor.

Affirmed.

1. Criminal Law ⇐1192

Defendant was not entitled, on remand of case after appeal from first-degree murder conviction, to call original 12 jurors to establish what effect certain handwritten note, found near scene of crime, might have had on their decision.

2. Criminal Law ⇐1192

Trial court properly interpreted remand order to obviate need to consider impact that certain handwritten note, found near scene of murder, might have had on jury at original sentencing.

3. Criminal Law ⇐1173.2(1)

Evidence warranted jury's finding that rape and murder, involving pitiless infliction of unnecessary pain on victim, were committed "in an especially heinous, atrocious or cruel manner," and failure of the trial court to instruct jury as to definition of that statutory phrase was insignificant. LSA-C.Cr.P. art. 905.4.

4. Homicide ⇐311

Requested special charge, to effect that, if jury found that defendant did not actually murder victim but was merely principal to the murder, it could not return verdict of death, was not wholly correct statement of law and, hence, there was no error in not giving the special charge. LSA-C.Cr.P. art. 807.

5. Criminal Law ⇐983

Codefendants do not have to receive identical sentences.

6. Criminal Law ⇐1208.1(4)

Before imposing death penalty, jury must consider both crime and particular offender.

7. Criminal Law ⇐983

Death sentence is not necessarily disproportionate because one defendant in factually similar case received life imprisonment.

8. Criminal Law ⇐983

Death sentence imposed upon conviction of first-degree murder was not excessive merely because codefendant, who was also found guilty of first-degree murder, received life imprisonment without benefit of parole, probation, or suspension of sentence. U.S.C.A. Const.Amend. 8.

9. Criminal Law ⇐1213

Fact that defendant was serving three consecutive life sentences in federal prison and that his date of discharge fell in second half of 21st century did not render death sentence imposed by state court unconstitutionally cruel and unusual by reason of asserted inordinate length of time between sentence and execution, given that there was nothing to bar federal authorities from returning defendant to state custody at earlier date. U.S.C.A. Const.Amend. 8; LSA-Const. Art. 1, § 20.

10. Homicide ⇐354

Death sentence imposed upon conviction of first-degree murder was neither excessive nor based on passion, prejudice, or any other arbitrary factor. U.S.C.A. Const. Amend. 8; LSA-Const. Art. 1, § 20; LSA-C.Cr.P. arts. 905.9, 905.9.1.

William J. Guste, Rutledge, Asst. Atty. Dist. Atty., William Reeves, Margaret A. tys., for plaintiff-app

S. Austin McElroy Ford, Franklinton, fo

WATSON, Justice.

Defendant, Robert victed of first degree to death. On initial was conditionally a vacated; and the ca determine whether, near the murder scen doubt about his guil hold a new penalty provided by LSA-C State v. Willie, 410

The facts of the c original opinion as fo

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On June 2, 1980, were arrested in B related crimes of ag vated kidnapping a committed against Hathaway. On Ju

William J. Guste, Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Marion Farmer, Dist. Atty., William R. Alford, Jr., Abbott Reeves, Margaret A. Coon, Asst. Dist. Attys., for plaintiff-appellee.

S. Austin McElroy, Covington, Thomas Ford, Franklinton, for defendant-appellant.

WATSON, Justice.

Defendant, Robert Lee Willie, was convicted of first degree murder and sentenced to death. On initial appeal his conviction was conditionally affirmed; the sentence vacated; and the case remanded: (1) to determine whether a printed note found near the murder scene created a reasonable doubt about his guilt; and, if not, (2) to hold a new penalty hearing by a jury, as provided by LSA-C.Cr.P. art. 905.1(B). *State v. Willie*, 410 So.2d 1019 (La.1982).

The facts of the crime are set out in the original opinion as follows:

"On May 28, 1980, at approximately 4:30 a.m., Robert Lee Willie and Joseph Vaccaro offered a ride to the victim, Faith Hathaway, outside of the Lakefront Theatre, a disco in Mandeville, Louisiana. Miss Hathaway, an 18 year old woman, had been celebrating her last night as a civilian before entering the United States Army. Instead of taking the victim to her home in St. Tammany Parish, as she had requested, Willie and Vaccaro took Hathaway to Fricke's Cave, a heavily wooded, secluded gorge south of Franklinton in Washington Parish. Willie or Vaccaro, or both, raped the young woman there. Afterwards, one of the men repeatedly stabbed the victim in the throat while the other held her hands. Hathaway's clothes and purse were found approximately one hundred fifty yards from her body on June 1st, 1980. Her body was discovered on June 4, 1980.

"On June 3, 1980, Willie and Vaccaro were arrested in Hope, Arkansas for unrelated crimes of aggravated rape, aggravated kidnapping and attempted murder committed against persons other than Hathaway. On June 10, 1980, both defendants admitted to police officers that they seized Hathaway but each accused the other of raping her and slashing her throat." 410 So.2d at 1023.

PROCEEDINGS ON REMAND

The trial court conducted an evidentiary hearing in regard to the note found near the scene of the crime. The crime occurred at Fricke's Cave, a "big wash" filled with trees, brush and swamp. (Transcript on Remand, Vol. II, p. 125) After some of Faith Hathaway's clothes were located on a Monday, three private individuals aiding in the search for her body found the note on Tuesday. The body was discovered on Wednesday, "three or four hundred feet south" of the clothes "down toward the swamp". (Transcript on Remand, Vol. II, p. 126) The note is an unsigned and printed message on a scrap of paper which reads "you never find her". Tests revealed no fingerprints. Willie denied printing the note. Willie's counsel did not engage a handwriting expert, because investigation indicated it would be futile. Vaccaro is illiterate. There was no evidence: (1) connecting the note with the crime or Willie; (2) showing who wrote the note; or (3) when it was left.

The trial court, after hearing the evidence, found that the note had no significance and did not create a reasonable doubt about Willie's guilt.

Immediately thereafter, the trial court commenced a new sentencing hearing. A jury was impaneled and evidence was presented by both the state and the defense. Following arguments by counsel and instructions by the court, the jury retired to deliberate. The jury found two aggravating circumstances: (1) that the defendant was engaged in the perpetration or attempted perpetration of aggravated rape; and, (2) that the offense was committed in an especially heinous, atrocious or cruel manner. The recommendation of the jury was that the defendant be sentenced to death.

On appeal from the proceedings on remand, the defendant assigns eight errors by the trial court.[1]

ASSIGNMENT OF ERROR NUMBER ONE

[1] Defendant argues that the court erred in not allowing him to call the original twelve jurors to establish what effect the note might have had on their decision.

The murder occurred in Fricke's Cave, a large gorge. The wadded up note was discovered some distance from the actual murder scene at the bottom of a steep embankment leading to the cave area. The note was found the day before the victim's body was located. Nothing was produced at the hearing which connected defendant or the crime with the note.

There is no authority for recalling jurors to examine them as to the effect some newly discovered article of evidence might have had upon them. On the contrary, the statutory law specifically prohibits impeachment of a verdict by a member of the jury.

"No juror, grand or petit, is competent to testify to his own or his fellow's misconduct, or to give evidence to explain, qualify or impeach any indictment or any verdict found by the body of which he is or was a member; but every juror, grand or petit, is a competent witness to rebut any attack upon the regularity of the conduct or of the findings of the body of which he is or was a member." LSA-R.S. 15:470.

The ruling of the trial court was correct. There is no merit to this assignment.

ASSIGNMENT OF ERROR NUMBER TWO

[2] Defendant argues that the court erred in not considering the possible effect the note might have had at the sentencing phase of the original trial. The ruling of the trial court was precise:

"From my understanding of the ruling of the Supreme Court in this particular case, it is up to this court to decide whether from the evidence presented a reasonable doubt would exist as to the guilt of the accused based upon its note and its effect that it might have on a jury. Based upon the evidence which the court has heard, based upon the evidence the court heard at the original hearing, the court does not think that the note adds anything significant one way or the other to the case of the defendant or, for that matter, to the case of the state. The court, therefore, deems it to be insignificant to not in any way create any reasonable doubt as to the guilt of the accused." Transcript on Remand, Vol. II, pp. 36-37.

The trial court was correct in its appreciation of the remand order: the sentence was set aside for other reasons. There was no requirement that the trial court consider what impact the note might have had on the jury at original sentencing.[2]

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

[3] Defendant contends that the trial court erred in not defining for the jury the phrase "in an especially heinous, atrocious or cruel manner". LSA-C.Cr.P. art. 905.4.

In instructing the jury, the trial court noted that the state relied on two aggravating circumstances. The first, aggravated rape, was defined for the jury but the second, that the crime was committed "in an especially heinous, atrocious or cruel manner" was not defined.

Defendant relies principally on *State v. Sonnier*, 402 So.2d 650 (La.1981). While *Sonnier* indicates that it is desirable for the trial court to instruct the jury about what constitutes a heinous crime, the square holding of that case does not mandate such an instruction. When the evidence reflects that, in fact, there was torture, or the pitiless infliction of unnecessary pain on the victim, the jury has correctly interpreted the meaning of this ag stance.

Faith Hathaway was morning hours on a leng oner, disrobed, forced t blindfolded down a steep the use of sufficient for skin on the inside of her her vaginal region, held spread eagle position and by repeated knife thrusts defendant's own statem the killing took place as

"... Joe [Vaccaro] m ground and then got now, and he just cut just started jugging with it man ... Ju mean jugging her.

"Qus: How many time stabbed her?

"Ans: I don't know n her head lying in his la by the hair. H

"Qus: What were you

"Ans: Freaking out n saying 'this whore ain't telling him come on n just kept jugging her n Hearing, Vol. III, p. 3

The defendant's descri and repeated "jugging" with the evidence in one thologist, Dr. Paul McGe Faith Hathaway was fo back with her legs spread ble and the arms extend The doctor stated that sh held in this position while bly to the point of death legs would not have rema er arms would not have ead; there is a natural the limbs closer to the bo fetal position. The pat that injuries to the inner area and the vaginal forceful rape prior to dea way also had a defensi right hand. Dr. McGeary

1. Although assignments one, two and four were not argued, they will be considered because this case involves a death penalty. *State v. Berry*, 391 So.2d 406 (La.1980).

2. Additionally, the note could not have had any sentencing significance to the jury.

3. "Jugging" in street talk

the meaning of this aggravating circumstance.

Faith Hathaway was taken in the early morning hours on a lengthy ride, held prisoner, disrobed, forced to walk naked and blindfolded down a steep gorge, raped with the use of sufficient force to damage the skin on the inside of her thighs and to tear her vaginal region, held with her legs in a spread eagle position and her throat slashed by repeated knife thrusts. The evidence in defendant's own statement reflected that the killing took place as follows:

"... Joe [Vaccaro] made her lay on the ground and then got his big old knife now, and he just cut her throat and he just started jugging her in the throat with it man ... Just jugging her, I mean jugging her.

"Qes: How many times do you think he stabbed her?

"Ans: I don't know man ... She had her head lying in his lap ... He had her by the hair ... He kept saying ...

"Qes: What were you doing.

"Ans: Freaking out man ... He kept saying 'this whore ain't dead yet'. I kept telling him come on man come on. He just kept jugging her man ..." Original Hearing, Vol. III, p. 385.

The defendant's description of the killing and repeated "jugging"[3] does not comport with the evidence in one respect. The pathologist, Dr. Paul McGeary, testified that Faith Hathaway was found lying on her back with her legs spread as wide as possible and the arms extended over her head. The doctor stated that she must have been held in this position while dying and probably to the point of death. Otherwise, her legs would not have remained extended and her arms would not have been held over the head; there is a natural tendency to draw the limbs closer to the body and curl up in a fetal position. The pathologist confirmed that injuries to the inner thighs, the genital area and the vaginal opening indicated forceful rape prior to death. Faith Hathaway also had a defensive wound on the right hand. Dr. McGeary testified that the victim would have required some minutes to die as a result of the cut throat and said her death would have been a painful one. A chain and medallion were embedded in her neck.

The jury correctly concluded that the crime was a heinous one; it involved the pitiless infliction of unnecessary pain on the victim. Since the jury's finding is supported by the evidence, failure to instruct the jury as to the definition of especially heinous, atrocious or cruel has no significance.

Further, since there was clear proof of one aggravating factor found by the jury, any error in charging the jury as to another factor is harmless. *State v. Narcisse*, 426 So.2d 118 (La.1983).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FOUR

[4] Defendant argues that the trial court erred in not giving a requested special charge as follows:

"If you find that the defendant did not actually murder the deceased but was merely a principal to the murder, then you cannot return a verdict of death."

A requested special charge shall be given, if it is not included in the general charge, and if it is wholly correct and pertinent. LSA-C.Cr.P. art. 807.

The requested special charge is not wholly correct. A principal in Louisiana who aids and abets in the commission of a first degree murder may be sentenced to death provided he had specific intent to kill or to inflict great bodily harm on the victim. *State v. Sonnier*, supra; *Enmund v. Florida*, —— U.S. ——, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

Therefore, the assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FIVE

Defendant contends that the trial court erred in imposing an excessive sentence. This argument turns on the fact that co-de-

3. "Jugging" in street talk usually refers to an upward slashing motion with a knife.

fendant Vaccaro was also found guilty of first degree murder but received life imprisonment without benefit of parole, probation, or suspension of sentence.

[5–8] Because a co-defendant received a less severe sentence, Willie's sentence is not ipso facto excessive. Co-defendants do not have to receive identical sentences. *State v. Jessie*, 429 So.2d 859 (La.1983); *State v. Laburre*, 427 So.2d 855 (La.1983); *State v. Rogers*, 405 So.2d 829 (La.1981). Before imposing the death penalty, a jury must consider both the crime and the particular offender. *State v. Sawyer*, 422 So.2d 96 (La.1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). A death sentence is not necessarily disproportionate because one defendant in a factually similar case received life imprisonment. *State v. Taylor*, 422 So.2d 109 (La.1982). While Willie may have been less culpable than his criminal partner, there is nothing to indicate that his role was a subsidiary one. Compare *State v. Sonnier*, 380 So.2d 1 (La. 1979).[4]

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER SIX

[9] Defendant argues that the trial court erred in imposing a sentence that was cruel and unusual in violation of the Constitutions of the United States and the State of Louisiana.

Because defendant is presently serving three consecutive life sentences in federal prison and his date of discharge falls in the second half of the twenty-first century, it is argued that defendant could not face execution until the year 2080 and the inordinate length of time between sentence and execution make the sentence unconstitutionally cruel and unusual. However, there is nothing to bar the federal authorities from returning Willie to state custody at an earlier date. *Causey v. Civiletti*, 621 F.2d 691 (5 Cir., 1980).

This assignment lacks merit.

4. According to Vaccaro, Willie was the one who raped and killed Faith Hathaway.

DEATH SENTENCE REVIEW

[10] This court is required to review every sentence of death for excessiveness. LSA–C.Cr.P. art. 905.9 provides as follows:

"The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review."

Three determinations are mandated by Rule 905.9.1:

"Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

"(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

"(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

"(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

A Uniform Capital Sentence Report with an attached pre-sentence investigation report has been submitted by the trial court. According to these reports, Robert Lee Willie is a twenty-five year old white male who has never been married and has no children. He has a low, normal I.Q. of 81. Willie has a minimal employment record, but a substantial history of criminal activity including simple burglary, motor vehicle violations, criminal damage, aggravated escape, conspiracy to kidnap, kidnapping and second degree murder.[5] At the present time, Willie is in the custody of the federal prison system serving a number of life sentences arising from the kidnapping charges. Defendant is also under indictment for killing a police officer in 1978.

5. Although that offense, the murder of Dennis Hemly, was committed prior to the instant offense, Willie was not convicted until after the current proceedings.

The pre-sentence repo
cludes that Willie constitu
clear threat to society.

PASSION, PREJUDICE
FACTORS

There is no indication o
passion, prejudice or any
entered into the death se
fendant.

AGGRAVATING CIRCU

The two aggravatin
found by the jury were th
committed during the pe
tempted perpetration of
and that the crime was
especially heinous, atrocio
ner. The evidence prese
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of the defendant and the
pathologist, bind strongly
circumstances. The victin
ably raped. She was take
naked, to a remote ar
spread-eagled on the gr
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until she died.

While any taking of life
as heinous, the facts of thi
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the offender to the pos
punishment.

PROPORTIONALITY

The Twenty-Second J
comprised of two parishes
St. Tammany. Defendan
ducted in Washington Pa
tence review memorand
the state includes inform
first degree murder cases
The memorandum includ
from St. Tammany Par
from Washington Parish.

In only two other case
trick and *State v. Clark*
death sentences been imp
was tried in St. Tamma
and his case has not yet

* Calogero and Dennis, JJ., w
ing.

The pre-sentence report correctly concludes that Willie constitutes a serious and clear threat to society.

PASSION, PREJUDICE OR ARBITRARY FACTORS

There is no indication or contention that passion, prejudice or any arbitrary factor entered into the death sentence given defendant.

AGGRAVATING CIRCUMSTANCES

The two aggravating circumstances found by the jury were that the crime was committed during the perpetration or attempted perpetration of aggravated rape and that the crime was committed in an especially heinous, atrocious or cruel manner. The evidence presented at the sentencing hearing, particularly the statement of the defendant and the testimony of the pathologist, tend strongly to support both circumstances. The victim was unquestionably raped. She was taken, blindfolded and naked, to a remote area where, while spread-eagled on the ground, her throat was repeatedly slashed by one of the perpetrators while the other held her legs spread until she died.

While any taking of life may be described as heinous, the facts of this crime place it in the category contemplated by the legislature when it provided that especially heinous, atrocious or cruel homicides subject the offender to the possibility of capital punishment.

PROPORTIONALITY

The Twenty-Second Judicial District is comprised of two parishes, Washington and St. Tammany. Defendant's trial was conducted in Washington Parish but the sentence review memorandum submitted by the state includes information concerning first degree murder cases in both parishes. The memorandum includes seventeen cases from St. Tammany Parish and fourteen from Washington Parish.

In only two other cases, *State v. Kirkpatrick* and *State v. Clark and Mikell*, have death sentences been imposed. Kirkpatrick was tried in St. Tammany Parish in 1983 and his case has not yet had appellate review. The death sentences of Roy Clark, Jr., and Brent Mikell were vacated and they were sentenced to life imprisonment because their death sentences were imposed under an unconstitutional statute. *State v. Clark*, 340 So.2d 208 (La.1976), cert. denied 430 U.S. 936, 97 S.Ct. 1563, 51 L.Ed.2d 782.

The only case with facts somewhat similar to those here is *State v. Moran*, 370 So.2d 532 (La.1979), a St. Tammany prosecution. Moran forced the victim into his vehicle, drove her from New Orleans to Slidell, raped, stabbed and choked her. The victim actually died of drowning. Moran was sentenced to life imprisonment without benefit of probation, parole or suspension of sentence. However, the defendant was a person with mental problems, and the jury may have concluded that his responsibility was diminished by that fact.

Considering the sentence review memoranda submitted by both the state and the defendant, and the paucity of similar cases, the sentence imposed on the defendant, Robert Lee Willie, cannot be said to be disproportionate.

CONCLUSION

For the reasons assigned, the conviction and sentence of the defendant, Robert Lee Willie, are affirmed.

AFFIRMED.

KEY NUMBER SYSTEM

STATE ex rel. Danny H. GRAFFAGNINO

v.

John T. KING, Secretary of the Louisiana Department of Corrections, J.D. Middlebrooks, Warden.

STATE of Louisiana

v.

Danny H. GRAFFAGNINO.

Nos. 82-KH-0556, 83-KA-0016.

Supreme Court of Louisiana.

June 27, 1983.

Rehearing Denied Sept. 1, 1983.*

Defendant, convicted in nonjury trial of forcible rape was sentenced to eight

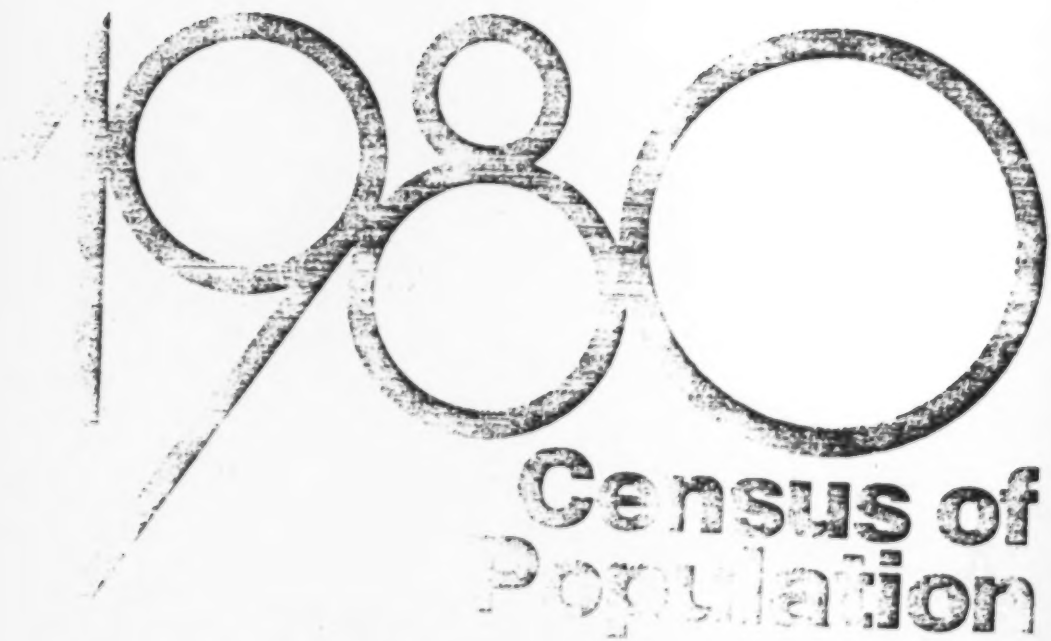
* Calogero and Dennis, JJ., would grant a rehearing.

20

CHARACTERISTICS OF THE POPULATION

Number of Inhabitants

INDIANA



U.S. Department of Commerce
BUREAU OF THE CENSUS

Table 2. Land Area and Population: 1930 to 1980

[Counts relate to parishes as defined at each census. For meaning of symbols, see introduction]

Parishes	1980 land area: Square miles	1980 land area: Square kilometers	Population 1980: Number	1980: Per square mile	1980: Per square kilometer	Percent change 1970 to 1980	Percent change 1960 to 1970	1970	1960	1950	1940	1930
The State	44 521	115 310	4 205 900	94.5	36.5	15.4	11.9	3 644 637	3 257 022	2 683 516	2 363 880	2 101 593
Acadia	657	1 701	56 427	85.9	33.2	8.3	4.4	52 109	49 931	47 050	46 260	39 326
Allen	766	1 982	21 390	27.9	10.8	2.9	4.7	20 794	19 867	18 835	17 540	15 261
Ascension	296	767	50 068	169.1	65.3	35.5	22.8	37 086	27 927	22 387	21 215	18 438
Assumption	342	886	22 084	64.6	24.9	12.4	9.2	19 654	17 991	17 278	18 541	15 990
Avoyelles	846	2 192	41 393	48.9	18.9	9.6	0.4	37 751	37 606	38 031	39 256	34 926
Beauregard	1 163	3 012	29 692	25.5	9.9	29.7	19.3	22 888	19 191	17 766	14 847	14 569
Bienville	815	2 112	16 387	20.1	7.8	2.3	-4.2	16 024	16 726	19 105	23 933	23 789
Bossier	845	2 188	80 721	95.5	36.9	22.5	14.3	65 877	57 622	40 139	33 162	28 388
Caddo	894	2 316	252 358	282.3	109.0	9.6	2.8	230 184	223 859	176 547	150 203	124 670
Calcasieu	1 081	2 801	167 223	154.7	59.7	15.0	-	145 415	145 475	89 635	56 506	41 963
Caldwell	541	1 400	10 761	19.9	7.7	15.0	3.9	9 354	9 004	10 293	12 046	10 430
Cameron	1 417	3 670	9 336	6.6	2.5	13.9	18.6	8 194	6 909	6 244	7 203	6 054
Catahoula	722	1 870	12 287	16.8	6.5	4.4	3.0	11 769	11 421	11 834	14 618	12 451
Claiborne	765	1 981	17 095	22.3	8.6	0.4	-12.3	17 024	19 407	25 063	29 855	32 285
Concordia	717	1 857	22 981	32.1	12.4	1.8	10.3	22 578	20 467	14 398	14 562	12 778
De Soto	880	2 280	25 727	29.2	11.3	13.0	-6.1	22 764	24 248	24 398	31 803	31 016
East Baton Rouge	458	1 187	366 191	799.5	308.5	28.4	24.0	285 167	230 058	158 236	88 415	68 208
East Carroll	426	1 103	11 772	27.6	10.7	-4.8	-10.7	12 884	14 433	16 302	19 023	15 815
East Feliciana	455	1 179	19 015	41.8	16.1	7.7	-12.6	17 657	20 198	19 133	18 039	17 449
Evangeline	667	1 728	33 343	50.0	19.3	4.4	0.9	31 932	31 639	31 629	30 497	25 483
Franklin	635	1 646	24 141	38.0	14.7	0.8	-8.2	23 946	26 088	29 376	32 382	30 530
Grant	653	1 690	16 703	25.6	9.9	22.2	2.6	13 671	13 330	14 263	15 933	15 759
Iberia	589	1 526	63 752	108.2	41.8	11.1	11.1	57 397	51 657	40 059	37 183	28 192
Iberville	637	1 651	32 159	50.5	19.5	4.6	2.7	30 746	29 939	26 750	27 721	24 638
Jackson	578	1 498	17 321	30.0	11.6	8.5	0.9	15 963	15 828	15 434	17 807	13 808
Jefferson	347	900	454 592	1310.1	505.1	34.4	62.0	338 229	208 769	103 873	50 427	40 032
Jefferson Davis	655	1 697	32 168	49.1	19.0	8.8	-0.9	29 554	29 825	26 298	24 191	19 765
Lafayette	270	699	150 017	555.6	214.6	34.4	31.9	111 643	84 656	57 743	43 941	38 827
Lafourche	1 141	2 954	82 483	72.3	27.9	19.6	24.5	68 941	55 381	42 209	38 615	32 419
La Salle	638	1 652	17 004	26.7	10.3	27.9	2.2	13 295	13 011	12 717	10 959	11 668
Lincoln	472	1 223	39 763	84.2	32.5	17.6	18.5	33 800	28 535	25 782	24 790	22 832
Livingston	661	1 711	58 806	89.0	34.4	61.1	35.4	36 511	26 974	20 054	17 790	8 206
Madison	631	1 634	15 975	25.3	9.8	6.0	-8.4	15 065	16 444	17 451	18 443	14 829
Morehouse	807	2 089	34 803	43.1	16.7	7.2	-3.7	32 463	33 709	32 038	27 571	22 579
Natchitoches	1 264	3 273	39 863	31.5	12.2	13.2	-1.2	35 219	35 653	38 144	42 997	38 477
Orleans	199	516	557 515	2801.6	1080.5	-6.1	-5.4	593 471	627 525	570 445	494 537	458 762
Ouachita	627	1 623	139 241	222.1	85.8	20.7	13.5	115 387	101 663	74 713	59 168	54 337
Plaquemines	1 035	2 680	26 049	25.2	9.7	3.3	11.9	25 225	22 545	14 239	12 318	9 608
Pointe Coupee	566	1 466	24 045	42.5	16.4	9.3	-2.2	22 002	22 488	21 841	24 004	21 007
Rapides	1 341	3 474	135 282	100.9	38.9	14.6	6.0	118 078	111 351	90 648	73 370	65 455
Red River	394	1 020	10 433	26.5	10.2	13.1	-7.5	9 226	9 978	12 113	15 881	16 078
Richland	563	1 458	22 187	39.4	15.2	1.9	-8.6	21 774	23 824	26 672	28 829	26 374
Sabine	855	2 215	25 280	29.6	11.4	35.6	0.4	18 638	18 564	20 880	23 586	24 110
St. Bernard	486	1 260	64 097	131.9	50.9	25.2	59.0	51 185	32 186	11 087	7 280	6 512
St. Charles	286	742	37 259	130.3	50.2	26.1	39.3	29 550	21 219	13 363	12 321	12 111
St. Helena	409	1 060	9 827	24.0	9.3	-1.1	8.5	9 937	9 162	9 013	9 542	8 492
St. James	248	643	21 495	86.7	33.4	8.9	7.4	19 733	18 369	15 334	16 596	15 338
St. John the Baptist	213	551	31 924	149.9	57.9	34.1	29.1	23 813	18 439	14 861	14 766	14 078
St. Landry	936	2 424	84 128	89.9	34.7	4.7	-1.4	80 364	81 493	78 476	71 481	60 074
St. Martin	749	1 940	40 214	53.7	20.7	23.9	11.7	32 453	29 063	26 353	26 394	21 767
St. Mary	613	1 587	64 253	104.8	40.5	5.8	24.4	60 752	48 833	35 848	31 458	29 397
St. Tammany	873	2 262	110 869	127.0	49.0	74.4	64.5	63 585	38 643	26 988	23 624	20 929
Tangipahoa	783	2 029	80 698	103.1	39.8	22.5	10.8	65 875	59 434	53 218	45 519	46 227
Tensas	623	1 613	8 525	13.7	5.3	-12.4	-17.5	9 732	11 796	13 209	15 940	15 096
Terrebonne	1 367	3 541	94 393	69.1	26.7	24.1	25.1	76 049	60 771	43 328	35 880	29 816
Union	884	2 289	21 167	23.9	9.2	14.7	4.7	18 447	17 624	19 141	20 943	20 731
Vermilion	1 205	3 122	48 458	40.2	15.5	12.5	10.9	43 071	38 855	36 929	37 750	33 684
Vernon	1 332	3 449	53 475	40.1	15.5	-0.6	193.9	53 794	18 301	18 974	19 142	20 047
Washington	676	1 750	44 207	65.4	25.3	5.3	-4.6	41 987	44 015	38 371	34 443	29 904
Webster	602	1 560	43 631	72.5	28.0	9.2	0.6	39 939	39 701	35 704	33 676	29 458
West Baton Rouge	194	502	19 086	98.4	38.0	13.2	14.0	16 864	14 796	11 738	11 263	9 716
West Carroll	360	932	12 922	35.9	13.9	-0.8	-8.1	13 028	14 177	17 248	19 252	12 595
West Feliciana	406	1 051	12 186	30.0	11.6	13.2	-13.2	10 761	12 395	10 169	11 720	10 924
Winn	953	2 468	17 253	18.1	7.0	5.4	2.1	16 369	16 034	16 119	16 923	16 766

No, sir.

MR. ALFORD:

Seriously sir, if - - would the fact that you know Mr. Farmer, would that in any way prevent you from serving as a fair and impartial juror?

MR. MORRIS:

I don't think.

MR. ALFORD:

Thank you.

VOIR DIRE EXAMINATION BY MR. SIMMONS:

I would like to go ahead and start if I might by asking some questions pertaining to the publicity that we have had prior to trial. Mrs. Jenkins, can you tell us now, that you would be able to be as fair and impartial in your deliberation in this trial, were you selected on the jury as you might have been had you never read anything or heard anything or discussed anything pertaining to this case?

MRS. JENKINS:

I would try to be.

MR. SIMMONS:

I know you would make a good faith effort to try to be, and I must press you for a definite answer I am afraid, would you be able to tell this Court that you could definitely beyond any doubt in your mind be able to put these preconceived ideas that you might have and information that you have received from pre-trial publicity where it may be right or wrong out of your mind in order that you might decide this case as fairly and as impartially as

if you had never heard any of it?

MRS. JENKINS:

I think it would be doubtful, that I could do that.

MR. SIMMONS:

You really don't believe you could?

MRS. JENKINS:

I don't believe I could do that.

MR. SIMMONS:

Is that your best honest opinion?

MRS. JENKINS:

That is my opinion.

MR. SIMMONS:

Your Honor, I would submit a challenge for cause.

MR. ALFORD:

Your Honor, the State would agree to excuse the lady by consent.

THE COURT:

You are excused by consent. You may go. Come back Wednesday.

MR. SIMMONS:

Thank you ma'am.

VOIR DIRE EXAMINATION BY MR. SIMMONS:

Mr. Morris, you also indicated that you had read and heard I believe, about this case, have you discussed this with anyone?

MR. MORRIS:

Not in particular, no, sir.

MR. SIMMONS:

Have you for instance, discussed it with a friend in conversation or did you have a conversation with

BY MR. ALEXANDER: I tender the jury.

EXAMINATION BY MR. McELROY:

Q. Mrs. Jenkins, before we get started with the rest of the panel, did I hear you have a conversation with Mr. Farmer, the district attorney, before the proceedings started this afternoon?

BY MRS. ERROL L. JENKINS:

A. Well, I guess you did, but I called the wrong man Mr. Farmer. My son was a classmate of his and I said, "Mr. Farmer," and it was to the wrong man here. That is the kind of conversation it was.

Q. Mr. Farmer responded to you and spoke to you, though, about your son and L.S.U. and all that, and you told Mr. Farmer that you and your son were proud of him and the job he's doing?

A. Well, yes.

Q. Do you think the fact that you're proud of Mr. Farmer and the job he's doing is going to affect your deliberations on this case?

A. Of course not.

Q. I believe you also said that you read just about everything or all the newspaper coverage and you heard about this case on the radio?

A. Yes, I did.

Q. Did you read the facts of this case in the newspapers or hear them on the radio?

A. I read what was in the paper, I did, and what was on the television I heard.

Q. And I believe you said you formed an opinion?

A. Yes.

Q. Did the fact that the source of most newspaper coverage was the district attorney's office and the sheriff's office, did that fact impress you while you were reading the articles?

A. Well, I think the facts that were presented and printed in the paper is what impressed me.

Q. It wasn't so much the source but the facts that were there?

A. Right.

Q. Would you say that you followed this case through the newspapers?

A. I would say whatever was printed in the paper about it I read it.

Q. And you have formed an opinion about that?

A. I did.

Q. And it's your testimony in spite of knowing the facts about this case, all the facts, that you could put that opinion aside and be fair?

A. I feel like I could, yes.

Q. You understand that you would have to ignore everything you read in the newspapers?

A. I understand that.

Q. That you saw on the television and heard on the radio?

A. I understand.

Q. Mr. Williams?

BY MR. ALBERT D. WILLIAMS:

You will come back Wednesday morning. I believe Mrs. Melton was also excused by consent, so she is not involved. If you will wait just one moment, the Bailiff will get your slips of paper with your names on it and he will lead you to where you need to go.

Bailiff.

THE BAILIFF:

Yes, sir.

THE COURT:

Approach the bench.

Are we ready to bring in the panel gentlemen?

MR. ALFORD

The State is ready your Honor.

THE COURT:

Bring in the jury.

(The jury is brought into open Court by the Sheriff.)

THE COURT:

The Sheriff will call fifteen names at random.

(The following list of prospective jurors were called and duly sworn. Number one, Larry Warner; number two, Dymple Seal; number three, Bobby Sue Thomas; number four, Ellie Wayne King; number five, Chess Adams; number six, Joseph I. Byrd; number seven, Jeffrey R. Boone; number eight, Willie Jean Roberts; number nine, Paul Simmons; number ten, Frank J. Rester; number eleven, Samuel G. Seal; number twelve, Joe Matthews; number thirteen, Gary W. Wheat; number fourteen, Dolly W. Sanders; number fifteen, Shirley M. Freeman.)

THE COURT:

MR. ALFORD:

What about T.V., have you seen anything on T.V.?

MISS SEAL:

No, sir.

MR. ALFORD:

Have you formed any opinion as to Joe Vaccaro's guilt or innocence?

MISS SEAL:

No, sir.

MR. ALFORD:

Do you feel you can be fair and impartial and make your decision based solely upon the law and the evidence that you hear in this courtroom?

MISS SEAL:

Yes, sir.

MR. ALFORD:

Miss Thomas, have you read anything?

MISS THOMAS:

Just what was in the Daily News.

MR. ALFORD:

The Daily News?

MISS THOMAS:

(Nods affirmatively.)

MR. ALFORD:

I ask you the same question, have you formed any opinion about the Defendant's guilt or innocence?

MISS THOMAS:

No, sir.

THE COURT:

Miss Thomas, I can't hear you.

MISS THOMAS:

No, sir.

THE COURT:

You have got to speak up where I can hear you so the Court Reporter can hear you.

MR. ALFORD:

You feel that you can make your decision based solely on the law and the evidence?

MISS THOMAS:

Yes, sir.

MR. ALFORD:

Mr. King, have you read anything about this case?

MR. KING:

Yes, sir, the Daily News.

MR. ALFORD:

Any other newspapers you recall reading?

MR. KING:

No, sir.

MR. ALFORD:

What about T.V.? Or radio?

MR. KING:

Some on T.V.

MR. ALFORD:

Do you feel that you can put all of that aside and make your decision based solely upon the law and the evidence that you hear in this courtroom, sir?

MR. KING:

Yes, sir.

MR. ALFORD:

You feel you can be a fair and impartial juror?

to wait on you just a minute. What about you, Mrs. Brumfield?

BY MRS. QUIDA BRUMFIELD:

A. No, I haven't formed an opinion.

Q. Okay. How about you, Mr. Case?

BY MR. GEORGE C. CASE:

A. No, sir, I don't know the incidents at all, just what I read about the trial.

Q. Alright. What about you, Mrs. Thomas?

BY MRS. BOBBYSUE THOMAS:

A I don't know if I can be fair to it or not.

Q. I'm asking you jut right now, you limit and answer. Have you formed an opinion from what you read or might have heard?

A. I have.

Q. You have formed an opinion?

A. Yes.

Q. How about you, Mrs. Roberts?

BY MRS. WILLIE JEAN ROBERTS:

A. I have not.

Q. Okay, how about you, Mrs. Taylor?

BY MRS. DEBORAH C. TAYLOR:

A. No.

Q. Mr. Lee?

BY MR. WALTER L. LEE:

A. No.

Q. Mrs. Burkhalter?

A. No.

Q. Mr. Strahan?

BY MR. DAVID L. STRAHAN:

A. No, sir, I haven't.

Q. Okay, Mrs. Lewis?

BY MRS. HELEN LEWIS:

A. No, sir.

Q. Mr. Thomas?

BY MR. GEORGE E. THOMAS:

A. No.

Q. Now I'm going to direct these questions to you, Mr. Burch and to you, Mrs. Thomas. Could you disregard anything that you might have read, any opinion that you might have formed, listen to the evidence which is given here in the courtroom and regardless of what you might have read outside the courtroom, render a verdict which is fair and impartial to the State of Louisiana and to the defendant in this case, can you do that? That means putting aside what you might have read or heard, listening to the evidence, and deciding this case solely on what you hear in this courtroom? You can do that, Mr. Burch?

BY MR. JAMES RAY BURCH:

A. I believe so.

Q. Can you do that, Mrs. Thomas?

BY MRS. BOBBY SUE THOMAS:

A. Yes, sir.

Q. Now, as I stated before, this defendant is charged

A. Yes, sir.

Q. You realize that an individual who is accused of a crime is entitled to a judgment only on the evidence and testimony in this courtroom?

A. Yes, sir. The only thing I read about it was either in the Thursday or Friday paper about the trial.

Q. Do you recall whether or not the facts were discussed in that article?

A. I just glanced at it. I don't remember the facts.

Q. Mrs. Thomas, I notice that you have a young daughter
BY MRS. BOBBY SUE THOMAS:
A. She's only ten.

Q. Okay. Does that present any problem to you?

A. No, sir.

Q. The nature of the crime that is charged?

A. No, sir.

Q. Would that make you want to serve on this jury possibly?

A. No, sir.

Q. You are aware the only thing you can consider is what goes on in this courtroom?

A. Yes.

Q. You said earlier that you have formed an opinion about this case.

A. Well, since Judge Crain said that, I believe I could be fair.

Q. In spite of the fact that you have an opinion?

A. Yes, sir.

anything. Mr. Hunt, you said you've read all the papers?

BY MR. DARROL L. HUNT:

A. I am not going to say all of them, but several of them.

Q. Well, a number of them?

A. Yes, sir.

Q. Have you seen pictures in the newspaper?

A. I believe so.

Q. And because of what you've read, you say you haven't formed any opinions?

A. No, sir, I didn't.

Q. Do you think because a person has been arrested that would raise an implication?

A. No, sir.

Q. Or the indictment itself?

A. No, sir.

Q. Mrs. Morris, now you say you've read the papers and seen it on television?

BY MRS. JUDY F. MORRIS:

A. Yes, I have.

Q. Have you seen it more than once in the newspaper?

A. Yes, sir.

Q. More than once on television?

A. Yes, sir.

Q. Do you recall whether or not you read the facts of this case?

A. I kept up with it.

Q. So then you know everything the papers have had to say about it?

A. I have read what was in the paper. Now if I could remember it all, probably not.

Q. Okay, let me ask you this, if something that is said here conflicts with either what you read in the paper, are you going to be able to put what you read in the paper out of your mind and just go on what has been said here in court?

A. I could. The papers are not always that accurate.

Q. That's not important, but the fact that you've read it and you remember it.

A. I believe more what was said in here than what I read out of the paper.

Q. Alright. Does the fact that a person has been arrested mean anything to you?

A. No, but they wouldn't have arrested him unless they had some evidence against him in the first place to arrest him.

Q. Now how about the indictment itself?

A. No.

Q. That doesn't mean anything?

A. No.

Q. Now getting from that arrest, police officers are the ones who make arrests.

A. Right.

Q. I'm sure there are going to be some police officers to testify in this case.

Q. Would you expect before voting not guilty that we would have to do something to prove we're not guilty? In other words, could you vote not guilty if we didn't do anything to prove we're not guilty, even if the state failed to prove its case? If they didn't prove to you guilt beyond a reasonable doubt, could you find the defendant not guilty or would you expect him to prove that he wasn't guilty?

A. I would expect him to prove that he's not guilty.

BY MR. McELROY: I would ask that this juror be excused, your Honor.

BY THE COURT: Let me make sure he understands. It's just like I said before, and I want everybody to understand that, what you weigh is the state's evidence. The state has the burden. They present their case first, and if from the evidence which they have presented, they have failed to prove something that is necessary in order to obtain guilt, then at that time the defense has the right not to put on anything, just to rest on the inadequacy of the state's case. Could you in that

event, if that occurred, could you find the defendant not guilty?

A. No.

BY THE COURT: What you're doing is weighing the state's case. You don't weigh the defendant's case until after you weigh the state's case. They have the burden to carry of proof. If they fail to do it, then he doesn't have to do anything, because of this rule of presumption of innocence, you see. Now if they do it, you might expect something else. The first thing--

BY MR. McELROY: Your Honor, I'm going to object to that. Your Honor, if I may object to that statement. I don't think that's correct, and I would note an objection for the record on that last statement.

BY THE COURT: The state has to prove its case beyond a reasonable doubt, and if you feel like they have not done that after they present their case, then he

would be entitled to a verdict of not guilty: in other words, you weigh the evidence presented by the state before you expect anything. Can you do that?

A. I could do that.

BY THE COURT: You would not necessarily expect him to do anything, you would weigh the evidence of the case of the state as to what they presented?

A. Yes.

BY THE COURT: Do all of you understand that?

BY MR. McELROY: I'm going to continue my objection as to this juror, your Honor.

BY THE COURT I overrule the objection.

BY MR. McELROY: Please note my objection.

Q. Mr. Pigott, would you expect in any event that Mr. Willie would have to prove anything?

BY MR. ROBERT R. PIGOTT, II:

A. No, sir.

Q. Mr. Burch?

BY MR. JAMES RAY BURCH:

A. No, the state would have to.

BY MR. HOMER O. BRANCH, JR.:

A. Yes, I followed the case as close as the paper come out with it.

Q. Okay, you've read the articles?

A. Yes, sir.

Q. You know the facts of this case? And have you formed any opinion as a result of reading it?

A. I thought it was pretty terrible what I seen.

Q. Then you have formed an opinion?

A. Well, I don't --

Q. You said it was pretty clear what was done. That sounds like an offense.

BY MR. FARMER: That was not his words. He said it was pretty terrible.

BY THE COURT: That's what he said, and I want to know whether he formed an opinion to the guilt or innocence of the accused, and I don't want to know what the opinion is.

BY MR. McELROY: I'm not particularly concerned with that either, your Honor.

BY THE COURT: Well, let's get it straight.

Q. You read the articles. You do have an opinion about what happened.

A. I guess I made up my mind.

Q. And does that opinion concern guilt or innocence?

A. It wasn't, well, if the evidence comes out in the trial and all that I could go whichever way the evidence could point.

Q. Are you telling me that you could ignore what you've read

after following this case closely, as you said?

A. Yes, sir, I am pretty sure.

Q. I don't mean to belabor the point, but at this point pretty sure isn't really good enough.

A. Well, I guess you would say I have an opinion then.

Q. You do have an opinion as to the guilt or innocence?

A. Yes.

BY MR. McELROY: Your Honor, I ask that this juror be excused.

BY THE COURT: The question is not only if you have an opinion but can you, and we need to know this, and you need to search your own mind and tell us this, can you put aside any opinion that you might have, put aside any recollection of any facts that you might have read, listen to the evidence which is presented from the witness stand, and render a verdict based solely on that evidence.

A. I can do that.

BY THE COURT: I will deny it.

BY MR. McELROY: Note my objection please.

Q. Let me ask you this, Mr. Branch, now that we've gone through this little thing, can you forget this little banter that we've had and decide the case on the facts?

A. Yes, sir.

Q. Mrs. Edwards, you've indicated that you've read this in the newspapers?

(The prospective jurors nods in the affirmative.)

MR. ALFORD:

Your Honor, I don't believe it is a good challenge for cause. I believe the jurors just didn't understand.

MR. SIMMONS:

In view of the responses, I would like to ask a couple of questions your Honor.

THE COURT:

All right.

VOIR DIRE EXAMINATION BY MR. SIMMONS:

Nobody is here to try to trick you, ladies and gentlemen. I just want to ask you to make sure we have an understanding because you will have to have an understanding if you are going to do justice in this case. Let me give you another example, let's say Mr. Vaccaro was there and let's say he is drunk or on pills or whatever, and not himself, and let's say that Robert Willie says hold her hand and Joe doesn't know what is going on, he holds her hand and Mr. Willie comes up to her and kills her. Mr. Vaccaro didn't know he was going to kill her.

My question to you is, in that situation, would you automatically vote first degree murder on a case like that?

(The prospective jurors nods negatively.)

MR. SIMMONS:

You would not?

(The prospective jurors nods negatively.)

MR. SIMMONS:

By the same token, in the armed robbery, let's take

The burden of proof is on the State therefore to prove the guilt of Joseph Vaccaro beyond any reasonable doubt. Not only must they show that Joseph Vaccaro was there and Joseph Vaccaro might have killed her or taken part in it, not only must they prove that he probably took part in it or killed her, they must prove beyond any reasonable doubt that he did do it.

Now again, it is not enough for the State to prove that a crime was committed. It is not enough to prove that Robert Willie killed Faith Hathaway, but the State must prove that Joseph Vaccaro was a principal and that he intended it and that he participated in it and that he is guilty himself. I want to read to you a couple of Statutes. Did ya'll get to hear the statutues as we read them before? Did everybody hear what we were reading?

(The prospective jurors nods affirmatively.)

MR. SIMMONS:

Then I am not going to belabor that, we have read a couple of things to you, basically the difference between first degree murder and second degree murder and I will ask Mr. Alford to object if I slip up some how and don't give you this straight. I want you to know it straight.

First degree murder would be involved where Joe Vaccaro intended for her to die or to receive a serious great bodily harm and he was involved in an armed robbery and aggravated rape or an aggravated kidnapping at the same time. However, second degree murder would be involved where he may have been involved in some

Yes, sir.

THE COURT:

Before you go further, I need to call six additional jurors for downstairs. Let me interrupt you just one moment.

Sheriff, call six additional jurors to go downstairs with Judge Crain's courtroom. If you have already been down there and your name has been in the box and it comes up again, please let me know. We need six additional people to go downstairs.

(The following names are called to go to Judge Crain's courtroom. Number one, Julius A. Savant; number two, Craig Thomas; number three, Mrs. Burt D. Sharp; number four, Don E. Brown; number five, Morris Jefferson; number six, Walter J. Fournet.)

VOIR DIRE EXAMINATION BY MR. SIMMONS:

I won't be much longer, I know you are tired of listening to me. In a little while the State is going to make an opening statement which they are required to do and which they must do in order to tell you what they intend to prove. If they don't tell you everything, they can't do it, so they have to tell you, they have to tell you what they intend to prove. The Defense may put on an opening statement. We haven't decided whether we will or not, but we can if we want to. So whatever Mr. Alford or I or Mr. Ford or any of us say, the lawyers speaking up here, while we want you to pay attention to us, while we are trying to do our job, it is not evidence. The Judge is going to instruct you on the law and we are going to submit

BY MR. McELROY: The reason I don't have any preemptory challenges left--

BY THE COURT: You've exercised all your preemptory challenges.

BY MR. McELROY: I realize that.

BY MR. FARMER: Mr. Fournet is acceptable to the state, your Honor.

BY THE COURT: You have no challenge for cause you want to submit at this time.

(Mrs. Burt D. Sharp, Mr. Thomas Craig Wilkins, Mrs. Hazel Lee Edwards, Mr. Ronald G. Gill, Mr. Julius A. Savant, Mr. William Brumfield, Mr. Vernor E. Carr, Mr. Walter J. Fournet, being duly sworn as jurors.)

BY THE COURT: We will pick an alternate. I will give you one challenge each.

BY MR. FARMER: Start with Mr. Jefferson?

BY THE COURT: Mr. Jefferson.

BY MR. FARMER: State thanks but excuses Mr. Jefferson.

BY THE COURT: Have you been upstairs?

BY Mr. MORRIS JEFFERSON:

A. I've been up there, but they didn't choose me.

BY THE COURT: You haven't been called?

The date is 6-10-80, the time is 7:00 P.M. We are in Texarkana, Arkansas Police Department. This is an oral interview by Investigator Micheal Varnado with the D.A.'s Office and Donald Sharp with the St. Tammany Parish Sheriff's Office. This will be an interview with Robert L. Willie.

Ques: How old are you ?
Ans: 22.

Ques: And, your date of birth?
Ans: January 2nd, 1958.

Ques: Did you go to school?
Ans: Yes sir.

Ques: How much education have you got?
Ans: All through the ninth grade.

Ques: Went up to the ninth?
Ans: Yes sir.

Ques: I am showing you a consent to questioning form, it says... PD SF May of 1972, and on top of it... Texarkana, Arkansas Police Department. It is advising you of your rights. Are you aware of your rights?

Ans: Yes sir.

Ques: Do you want an attorney with you at this time?
Ans: No.

Ques: I want you to start from the beginning.. and this is on the Hataway girl, the girl that came missing from Mandeville, and I want you to be as detailed as you can.. and take me step by step as to what happened?
Speak up as loud as you can.

Ans: Well... we got load on valiums, run up some valiums.. and road around and went to Mandeville... picked this girl up...I asked her did.. she was walking on the side of the road and I asked her.. I said..."do you want a ride?", she said yes. So, she got in the middle of the seat between me and Joe . I asked her where she lived, she told me somewhere, I forgot,but anyway, I told Joe how to get there and then we pulled over on the side of the road and he got out and I got out and he went to the back of the car and he says.. ah.." Do you know where we can go fuck this whore?" I said "She's going to start freaking out man, if you don't bring her home", he said " don't worry about it" you know... and I said " I know a place that you can take her". So, we rode around and went up to Prickle Cave, and Joe blindfolded her and went down in the bottom of the hill, Joe made her lay on the ground and then got his big old knife now, and he just cut her throat and he just started jugging her in the throat with it man.. just jugging her, I mean jugging her.

Ques: How many times do you think he stabbed her?
Ans: I don't know man.. she had her head lying in his lap..he had her by the hair... he kept saying....

Ques: What were you doing?
Ans: Freaking out man.. he kept saying "this whore aint dead yet". I kept telling him, come on man, come on". He just kept jugging her man and then he said " We've got to get the fuck out of here".

Ques: Did you touch the girl?
Ans: I grabbed her hands when she started to get up after he done jugged her in the throat two or three times.

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Ques: Are you sober now?
Ans: Yes.

Ques: Have you had any drugs in the last day or two?
Ans: No.

Ques: What route did you all take up there to Prickle's Cave?
Ans: Folsum Highway...I believe...or up Lee Road and cut through Folsum Road... I believe that's how we went up there.

Ques: Up Lee Road?
Ans: Yes.

Ques: Did Joe Rape this girl?
Did he fuck her?
Ans: Yes.

Ques: He did??
Ans: Yes, he fucked her.

Ques: When did he fuck her?
Ans: When we got up there.

Ques: Was she trying to resist?
Ans: Naw.

Ques: She wasn't.
Ans: No, she was loaded.

Ques: When you first went down in there, did ya'll ...did you take off any of her clothes before ya'll got the the spot she laid down?

Ans: She had her clothes.. she had her pants off before we went down in there.

Ques: Do you remember where ya'll left the purse?
Ans: I don't know... Joe..she was asking me what we were going to do with her.. I kept telling her I didn't know and Joe had some kind of cosmetic thing.. a plastic bag she had all of her makeup and stuff in.

Ques: Do you remember what color purse she had?
Ans: No, I don't... all I know I didn't kill her man..I know that I'll take a Lie Detector Test for that.

Ques: What kind of vehicle were you all in when you went down there?
Ans: A Ford, blue Ford car.

Ques: Have you used any kind of force or threats ...?
Ans: Naw, you aint used nothing on me.. man.

Ques: You are giving this statement on your free will?
Ans: I'm just giving this statement on my own free will..'cause everybody's trying to put the blame on me and I just want to get everything straighten out.

Ques: You want to just get it off your mind?
Ans: That's it. I know that I didn't kill her, I know that much.

Ques: The clothes that Joe had on that night.. and you, did you all get any blood on them?
Ans: I didn't get any on mine.

Ques: Did Joe have any blood on him?
Ans: I couldn't say man... I was kind of..

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Ques: And then you all walked down the hill?
Ans: Yes.

Ques: And then you went by a log; do you remember the log where the clothes were?
Ans: I don't remember.

Ques: After you got to where Joe killed the girl, can you describe the ground around there; was it sandy was it pretty thick in there?

Ans: It don't have no brush around there, its just little small oak trees its deep, you know. .. a little sand here with some grass in it.

Ques: After you got there, Joe made her ..????
Ans: Sit down on the ground.

Ques: She was still blindfolded at that time?
Ans: Yes.

Ques: Did she sit down on anything?
Ans: Ah..

Ques: Was she nude at this time?
Ans: Yes.

Ques: She didn't have any clothes on?
Ans: Yes. She wanted her pants or something to sit on but ah..

Ques: Did he let her sit on her pants?
Ans: No. he didn't.

Ques: What did he say to her?
Ans: He said " sit down bitch".

Ques: Was he holding the knife on her at that time?
Ans: No, he didn't bring the knife out man.. until he got in the back of her and kneeled down behind her. Then he brought that big old bowie knife out.

Ques: He kneeled down behind her?
Ans: Yes.

Ques: What happened than?
Ans: He grabbed her hair and cut her throat.. man.. blood was just ....

Ques: He grabbed her hair from behind her?
Ans: Naw, he had it on the side. But he was behind her jugging her.

Ques: He came up from behind her?
Ans: Yes.

Ques: And, after he cut her, he started jugging her?
Ans: Yes. She started moving all kinds of ways and he just started jugging her in her throat... and he kept saying.." the fucking whore aint dead man" and I kept saying."uuuuon man, let's go let's go"

Ques : Did you have to hold the girl down?
Ans: Well, she went to jump up one time but man..

Ques: After he cut her?
Ans: Yes, I reckon reflex you know...

Ques : Is that when you grabbed her?
Ans: Yes, I said come on now an' behave.

Ques: You grabbed her by the wrist?
Ans: .... she said ah.. she said something.. why don't ya'll go on.

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Ques: This was after she was cut?
Ans: Yes. She said " why don't you all go on, and let me die by myself"

Ques: Joe just kept going?
Ans: Yes, he kept saying " this whole aint dead man" and he just started jugging her, he was jugging the knife all the way down man.

Ques: Do you remember her having anything around her neck? A necklace?
Ans: New , I didn't pay no attention when he cut her man...

Ques: Do you remember her having in jewelry?
Ans: New.

Ques: After all that, what did you all do then?
Ans: We left man.. I got the hell out of there.

Ques: You all got back into the car?
Ans: Yes.

Ques : And nobody said anything at all while driving on the road?
Ans: No, I was just freaking out.

Ques: Did you all leave a note?
Ans: I was just freaking out.

Ques: Did you leave a note?
Ans: Uh huh.

Ques: Did he leave a note?
Ans: New,he can't write man.

Ques: After you all got back out of the cave you all left and went straight back to Covington?

Ans: Yes.

Ques: And.. what did you do then?
Ans: He dropped me off and I reckon he went over to his momma's house..

Ques : Where did he drop you off at?
Ans: At my aunt Bessie's.

Ques : To this day, he hadn't mention it to you again?
Ans: No. I know I didn't kill her through man... I'll take a lie detector test...

SIGNED ______________________
DONALD SHARP
DEPUTY, ST. TAMMANY PARISH S. O.

SIGNED: [signature]
MICHAEL VARNADO
INVESTIGATOR, D. A. 'S OFF

SIGNED: Robert L. Willie
ROBERT L. WILLIE

DATE: ____________,19__

DATE: 6-11 ,1980

Witness: Robert D. Lambert, Special Agent, FBI 6/11/80, P.O. Box 891 Texarkana, Ark 75502

DATE: 6-11 ,1980

TFC Ronald L. Pierce
La. State Police

Transcribed by Jessie W
295 Inghram
Texarkana,
Phone: 772-3648

Gail L. Pinkston
Notary
Signed 6-11-80
Expires 9-21-81
Miller County, ARK

show that Faith Hathaway was killed. As distasteful as you might find it, it is your sworn duty to examine the facts in this particular case and not go into that jury room and decide this case on emotion. You have to find that the State of Louisiana has proven each and every element of the crime charged beyond a reasonable doubt, and if you don't so find, it is your duty to return a verdict of guilty to a lesser charge or not guilty. As much as your sympathy is right now with Faith Hathaway and her family, it is your sworn duty to ignore that and fairly judge the facts. We know that on the morning of May 28th of this year Faith Hathaway was killed and that Robert Willie was there. I don't think from the evidence we have that we can determine with any accuracy of the time of day this took place. The only person who told us what time he thought it was was on that particular day high on valium, L.S.D. and beer. How accurate can his recollection of the time be in this particular case? We also know that Joseph Vaccaro is the man who cut Faith Hathaway's throat. That is the evidence in this case. Mr. Alexander interprets that it was Robert Lee Willie, that's one thing, but the facts are in this case that you have before you that Joseph Vaccaro is the one who cut that girl's throat. We know Robert Willie was involved, but what exactly was his involvement? What does the evidence that we have indicate? The evidence is that when Faith Hathaway left work, she changed her clothes. W e do n't know whether she did it specifically at that point or sometime later in the evening. The clothes that she wore to work were put in that purse that Mr. Alexander showed you. She changed into a pair of jeans, and we really don't

that the next day they were together. The question, of course, arises, well, who put it into the truck? I submit that Joe Vaccaro did. The only evidence we have in this case is that Joe Vaccaro had that knife. He was the one who Eddie Sharp gave it to, and Robert Willie told them it was in the truck, probably in the truck. We spoke before about an atmosphere a desire to see Robert Willie convicted as charged. I'd like to go over another indication of that. Mike Varnado and Donald Sharp told us how they took the statement from Robert Willie. They remembered advising him of his rights, taking the statement, the whole thing, but they didn't remember being told that Robert Willie wanted to talk to a lawyer before he was questioned. Yet Donald Lambert of the F.B.I., who has got no interest in the outcome of this case, recalls specifically that he told them that Robert Willie wanted a lawyer before he spoke to anybody. Donald Sharp couldn't remember anything about that. Yet on cross examination at an earlier time Donald Sharp remembered it. On cross examination, Mike Varnado said he remembers that Robert Willie didn't want to make a statement to anyone, but he didn't know how he found that out or whether he just felt it or what. Were they lying? I don't think so. I think their recollection of the facts is geared towards one thing, to make sure that Robert Willie is convicted as charged.

If anything I have said or anything I will say offends you, please don't, don't hold that against Robert Willie. He's got no control over what I say up here. This is me speaking, not Robert Willie. Quite frankly, the evidence indicates that just prior to Joseph Vaccaro's killing Faith Hathaway, Robert Willie thought he was going to have his turn with Faith

Hathaway. The pants were folded under her and she was down on the ground. Robert Willie, as you heard the testimony, was standing in front of her. Totally and unexpectedly, Joseph Vaccaro pulls out the knife that Eddie Sharp had given to him and starts cutting Faith Hathaway. Robert Willie was under the influence of drugs. You or I probably would have punched, or even killed Joe Vaccaro at that point. But then you and I are not under the influence of drugs. What Robert Willie did and says offends the hell out of you. I can tell that by looking at you. We can't make that go away. It happened. But Robert Willie didn't kill Faith Hathaway. Robert Willie didn't know that Joseph Vaccaro was going to kill Faith Hathaway. He acted in a manner that offends everybody, but he's not guilty of murdering Faith Hathaway. To find Robert Lee Willie guilty, you have to find that he had the specific intent, and the judge is going to tell you what that is, to kill. I submit to you based on the evidence you cannot find that. Thank you.

BY MR. ALEXANDER: Ladies and gentlemen of the jury, this is my last chance to talk to you, and I'm going to be as brief as possible, but I feel there are a few things that really need to be brought out at this time of the trial. First of all, let's get rid of this business about Robert Lee Willie being full of valium, full of L.S.D., full of beer. The defense wants you to believe that he didn't know what he was doing and therefore he couldn't form the specific intent to qualify under the first degree murder statute.

Well, there's two things I want to remind you of about that. Okay? Number one, nobody poured any beer down his throat, nobody poured any valiums down his throat, nobody

Robert Willie and Joe Vaccaro were her judges and jury and executioner. I think that no matter how Mr. McElroy would like you to beget Dr. McGeary's testimony, Dr. McGeary's testimony, once you establish that Robert Willie was on the scene, and that's really the only significance from the standpoint, from our standpoint of the state, that's the only significance, it clearly establishes that he was on the scene, and from there on all you need is Dr. McGeary, that's all you need. Because the facts speak for themselves as to what happened, and this is not speculation as to what happened. You've got to remember Dr. McGeary's testimony. Two people held that girl until she was dead or unconscious and near dead. Now if that's not intentional and if that's not cold blooded, then what is it? There's no other explanation for it. That's exactly what it is. Now let me ask you this, and this is in the law.

Suppose that through an act of God that one of you at the moment that Robert Willie is between her legs and that Joe Vaccaro is holding her hands, that one of us walked up on that scene, nude girl, blindfolded, probably screaming, scared to death, and God willed it that we had a gun, I think almost everyone of us without hesitation would have blown them both away and that we'd have grabbed that little girl and if we had a blanket we'd have wrapped her, and we would have hugged her, and we would have been proud of ourself that we saved her life, that we kept her from being raped, and we wouldn't have had one bit of remorse that we used the gun and we'd have been right under the law. The law says that we would have been right to do exactly what we did. Well, if we have that right and the law says that we have that right, as it does, then we also have the right to impose the ultimate penalty on Robert Willie. The state has alleged that the

kind of human being is that? That's the type of human being that when convicted of first degree murder and when the evidence is as strong as it is in this case, that the only punishment is death. And why? Why is that? Why is the only puhishment death? Because if we as a community, if you as a group of citizens are going to say that life is valuable, you are going to say that Faith Hathaway had a right to live. If you believe that that little girl had a right to live, a right to go about her life, she may have never married a senator or president, but she was trying to do something constructive with her life. She was going in the service. It's not easy for somebody to do. But if you are going to say that she had a right to live, which she certainly did, and that Robert Willie didn't have a right to take her life, then as punishment for Robert Willie taking her life, you're going to give him life, where is the justice of it? If

you're going to hold anything holy about the life of Faith Hathaway, if you're going to say that it has any value at all, you've got to say the death penalty, because otherwise you're saying, Robert Willie, your life is more valuable than Faith Hathaway's, your life means more than Faith Hathaway. I certainly hope that you can't say that. The evidence certainly doesn't indicate that his life is even close to the value to that of Faith Hathaway, but even being putting a value on it, the two lives. He took her life. He deserves that.

BY THE COURT: Ladies and gentlemen, this defendant has been found guilty of first degree murder and you must now decide whether the defendant must be sentenced to death or to life imprisonment without benefit of parole, probation or suspension of sentence. In reaching your decision regarding the sentence to be imposed, you should be guided by these instructions. You are required to

Death sentence for first-degree murder offenses, which involved several aggravating circumstances and which were committed by 26-year-old defendant with a prior criminal record, was not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. State v. Sonnier, Sup.1979, 379 So.2d 1336, appeal after remand 402 So.2d 650.

In fulfilling its responsibility of reviewing jury's recommendation of death penalty, Supreme Court must conduct an independent review, regardless of the failure of defense counsel to object to possible error, to determine whether passion, prejudice or any arbitrary factor has contributed to the recommendation of death penalty. Id.

Death sentence for two counts of first-degree murder was not excessive, in view of indication that it was not imposed under influence of passion, prejudice or any other arbitrary factors, that there were one or more statutory aggravating circumstances and that the sentence was not disproportionate to the penalty imposed in similar cases. Id.

On consideration of aggravating and mitigating circumstances, imposition of death penalty for first-degree murder was not excessive. State v. Prejean, Sup.1979, 379 So.2d 240, certiorari denied 101 S.Ct. 253, 449 U.S. 891, 66 L.Ed.2d 119, rehearing denied 101 S.Ct. 598, 449 U.S. 1027, 66 L.Ed.2d 489.

In deciding whether death sentence is excessive, Supreme Court must consider whether sentence is imposed under influence of passion, prejudice or any other arbitrary factor; whether evidence supports jury's finding of aggravating circumstance under C.Cr.P. art. 905.4 and whether sentence is disproportionate to penalty imposed in similar cases, considering both crime and defendant. Id.

2. Objections

By failure to object at trial that none of three aggravating circumstances found by the jury was supported by the record, defense counsel did not waive his objection, as the Supreme Court was empowered by this article to undertake an independent review of all death sentences. State v. Culberth, Sup.1980, 390 So.2d 847.

3. Reference by prosecutor to review

There is no absolute prohibition against prosecutor's reference in closing argument to commonly known fact that this article requires Supreme Court to review every death sentence, and such a reference does not necessarily serve to induce a juror to discard his responsibility, and thus issue should be determined in each individual case by viewing reference to appellate review in context in which remark was made. State v. Berry, Sup. 1980, 391 So.2d 406, concurred in part, dissented in part 396 So.2d 880, certiorari denied 101 S.Ct. 2347, 451 U.S. 1010, 68 L.Ed.2d 863.

Prosecutor's closing argument, which told jury that death penalty scheme under C.Cr.P. art. 905 et seq. provided adequate safeguards against arbitrary imposition of death sentence, and that weighing of all considerations enumerated in C.Cr.P. art. 905.4 and 905.5 warranted imposition of death penalty in instant case, did not serve to lessen significance of jury's role in overall scheme, and thus prosecutor's reference in closing to fact that this article requires Supreme Court to review every death sentence did not require reversal. Id.

When prosecutor's reference to appellate review of death sentence conveys message that jurors' awesome responsibility is lessened by fact that their decision is not the final one, of if reference contains inaccurate or misleading information, then defendant has not had a fair trial in sentencing phase, and penalty should be vacated. Id.

4. Presumptions and burden of proof

In reviewing a capital case in which an offender's potential for future release has been interjected into the proceedings by the State or the trial court, the Supreme Court must presume that a death sentence was imposed upon the influence of an arbitrary factor unless the record clearly indicates that the jury was properly informed of its duty and admonished to disregard the improper remarks, and the record indicates that the jury heeded the admonition. State v. Lindsey, Sup. 1981, 404 So.2d 466.

Supreme Court Rule 28

Rule 905.9.1. Capital sentence review (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record
transcript of the sentencing hearin
be transmitted to the court with
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Section 3. Uniform Capital S

(a) Whenever the death p
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"B"). The trial court may c
department of probation and
information needed to compl

(b) The trial judge shall c
report to be attached to the
inquire into the defendant's
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(c) Defense counsel and
completed Capital Sentence I
be afforded seven days to fi
opposition shows sufficient g
resolve any substantial facti
tion, if any, shall be affiche

(d) The preparation and
pending completion of the I

Section 4. Sentence Review

(a) In addition to the brie
the district attorney and t
dressed to the propriety of
ble, to that required for bri

(b) The district attorney
the time provided for the de
shall include:

i. a list of each first
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crime convicted, senter
record concerning the

ii. a synopsis of the
in the instant case;

iii. any other matte

(c) Defense counsel shall
time for the state to file its
to the state's memorandum

Section 5. Remand for Exp
for the development of facts r

Added Nov. 22, 1977, eff. Jan. 1, 1

Law Review Commentaries

United States Supreme Court ar
ishment: Uncertainty, ambiguity
control. Michael W. Combs, 7
Rev. 1 (1980).

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.

iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, eff. Jan. 1, 1978.

Law Review Commentaries

United States Supreme Court and capital punishment: Uncertainty, ambiguity, and judicial control. Michael W. Combs, 7 Southern U.L. Rev. 1 (1980).

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NO. 83-5836

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT LEE WILLIE,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

OPPOSITION OF STATE OF LOUISIANA TO WRIT OF CERTIORARI

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ATTORNEY OF RECORD

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OPPOSITION OF STATE OF LOUISIANA TO WRIT OF CERTIORARI

Respondent State of Louisiana respectfully prays that a writ of certiorari be denied and that review of the judgment of the Louisiana Supreme Court is unnecessary in this case for the reasons set forth below.

STATE'S RESPONSE TO ALLEGATIONS OF EXCESSIVE AND PREJUDICIAL PRE-TRIAL PUBLICITY

The applicant herein alleges that the trial court erred in not granting a change of venue prior to trial on the merits.

Louisiana Code of Criminal Procedure Article 621 sets forth the procedure for changing venue. The applicant makes no assertions that the correct procedure was not followed by the trial court. At issue is only whether the trial court's ruling denying the change was correct. Article 622 sets forth the grounds for change of venue as follows:

"A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.

In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial. (Emphasis added)"

There are a number of Louisiana cases construing Article 622. Clearly, the burden of proof is on the defendant in a motion for change of venue to establish that he cannot obtain a fair trial in the parish where the prosecution is pending. [1] The applicant for the most part ignores Louisiana jurisprudence in his brief, and for good reason: the Louisiana cases do not support his contentions.

There are a number of Louisiana cases which set forth the various elements for consideration in a change of venue ruling. These elements are perhaps most clearly set forth by the Supreme Court of Louisiana in both State v. Bell cases [2] as follows:

"* * * * (1) [T]he nature of pre-trial publicity and the particular degree to which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire."

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1 See State v. Monk, 315 So.2d 727 (1975); and State v. Flood, 301 So.2d 637 (1974).

2 State v. Bell, 315 So.2d 307, at 311 (1975); and State v. Bell, 346 So.2d 1090, at 1098 (1977).

The Supreme Court of Louisiana further listed factors which are relevant to the change of venue inquiry in the second State v. Bell case [3] and in State v. Berry. [4] These additional factors include the degree to which the publicity has circulated in areas to which venue could be changed; the care exercised and the ease encountered in the selection of the jury; the familiarity with the publicity complained of and its resultant effect, if any, upon the prospective jurors; and the peremptory challenges and challenges for cause exercised by the defendant in the selection of a jury.

In his original motion[5], the applicant herein had cited as the grounds for his request for change of venue "great and detrimental prejudice in the public mind" which he alleged was as a result of "great and widespread publicity through news media of all kinds". The applicant stated in his brief to the Supreme Court of Louisiana that hearings on this motion were held on October 8, 13 and 16, 1980. There was little pertinent testimony in the October 8 and 13, 1980, transcripts on the motion for change of venue. The applicant merely called to the stand newspaper representatives who testified to the circulation figures of their respective papers at the initial hearing, the purpose of which testimony is not clear as no connection was ever made between said figures and the case at bar or the prospective jurors. At the October 13, 1980, hearing, the applicant called to the stand a psychiatrist who testified generally about bias and prejudice, and a deputy who testified as to security arrangements for defendant.

The primary hearing on the motion was held on October 16, 1980, with the applicant herein calling three witnesses to the stand. These witnesses were District Attorney Marion B. Farmer, a newspaper reporter, and an in-

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3 Cited supra, footnote 2.

4 329 So.2d 738 (1976).

5 Supreme Court of Louisiana Record, Vol. I, page 148.

vestigator for District Attorney Farmer. The reporter, John Fahey, testified as to an interview he had with Mr. Farmer. Mr. Farmer also testified concerning the same interview, as well as about other murder cases handled by his staff. The investigator, Michael Varnado, testified that he asked John Fahey not to refer to any confession in reporting the details of the case against defendant. The trial court, after listening to all evidence presented by defendant, deferred ruling on the motion to change venue until after voir dire.[6] There was absolutely no showing made by the testimony of the above listed witnesses of prejudice in the mind of the public.

The applicant implies herein that the trial court's refusal to rule on the motion for change of venue prior to voir dire was in itself a denial of due process, but cites no authorities for this unique proposition. A comentator[7] indicates that an accused has the right to offer evidence of pre-trial publicity and community bias at a hearing on a motion for a change of venue, and that a defendant cannot be restricted to an examination of prospective jurors alone to determine whether he can obtain a fair trial in a particular community. But nothing in our positive law or our jurisprudence indicates that a trial judge must rule on the issue immediately upon conclusion of the pre-trial hearing, particularly where the hearing has been so inconclusive as in the instant case. The judge was entitled to consider the voir dire examinations along with the other evidence in reaching decisions as to prejudice.

Since the applicant alleges that prejudice arose in the public mind through news media coverage, it is important to examine the law on this issue as well as the facts of the case at hand. The most recent Louisiana case on point is State v. Albert, 381 So.2d 424 (1980). Albert involved a homicide with various newspaper reports at the time of the murder. Most of the jurors

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6 Transcript, Vol. V, page 102.

7 See "Change of Venue, Work of Appellate Courts 1974-75," by Cheney C. Joseph, Jr., 36 Louisiana Law Review 611, 1975-76.

had heard or read of the case. One of the articles referred to the slaying as one of three sensational murders which took place in the parish during the year. The Supreme Court of Louisiana found the articles to be factual and not inflammatory, and that the trial court ruled correctly in denying a change of venue.

In State v. Sonnier, 379 So.2d 1336 (1979), a double homicide, the Supreme Court of Louisiana found that pre-trial coverage by the news media was extensive and that there was significant public interest in the development of the case. The defense in Sonnier introduced twenty-four newspaper articles, published over a five month period, which ran either on the front page or the city page. The editor of one paper testified that the double murder was the top story of the year. The Court found that while the publicity was extensive, it consisted primarily of factual information reported regarding the events which were transpiring at the time. The Court concluded that the trial judge did not abuse his discretion in denying the defense motion for change of venue.

In State v. Bennett, 341 So.2d 847 (1977), the defense offered nineteen newspaper stories on the crime and the transcripts of several television accounts of the crime. The Court found that while there was extensive coverage of the incident, also a murder, there was no showing that the media reports were other than objective coverage. The Court found that the defendant failed to carry his burden in this case. There was no abuse of discretion by the trial judge in denying the motion for a change of venue.

In State v. Morris, 340 So.2d 195 (1976), the trial judge noted that the parish where the crime was committed is small and rural and a crime the magnitude of aggravated rape would be known to the residents. The Morris defendant presented eivdence of various newspaper accounts of the crime. The Court found that the articles were neither inflammatory nor sensational, but rather were factual accounts of the offense and the grand jury action. It was held that the trial judge was correct in denying the motion for change of venue.

In State v. Berry, 329 So.2d 731 (1976), the Supreme Court of Louisiana found that the defendant had been previously convicted in Orleans Parish of the rape-murder of a student nurse. The prior case had received extensive notoriety because the victim was relative of a prominent public official. In support of his motion, for change of venue in the subsequent case also in Orleans Parish, defendant introduced evidence of news medial publicity about the rape-murder as well as publicity about the case for which he was being then prosecuted. In one of the newspaper articles, an assistant district attorney was quoted as saying:

> "We want to make sure we have him permanently convicted. It's like putting icing on the cake."

Another pre-trial article recounted testimony of witnesses at a pre-trial hearing concerning the facts of the crime and the identification of the defendant in a police line-up. The publicity continued right up to time of trial and also included details of defendant's prior conviction. The Court, in affirming the denial of the motion to change venue, stated:

> ". . . (T)here was absolutely no evidence of the effect, if any, this pre-trial publicity may have had on the state of the public mind regarding the defendant. Although there was testimony that the broadcast coverage extended throughout the entire parish and we assume the newspaper circulation was equally comprehensive, there is no evidence of how many persons viewed the broadcasts and read the articles. There is no evidence in the record of the extent to which prospective or trial jurors were familiar with or affected by the publicity. The headlines of the articles were not inflammatory or overly bold, and the defendant presented no testimony as to their location in the newspapers. (Emphasis added)"

It is clear that Article 622, supra, requires a showing in Louisiana of more than mere knowledge by the public of the facts surrounding the offense for a change of venue to be granted.[8] There must be a showing that there

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[8] See State v. Richmond, 284 So.2d 317 (1973) at 323.

exists an inflamed opinion against a defendant or that warrants a conclusion that a defendant cannot get a fair and impartial trial.[9]

Turning to the facts of the case at hand, the nature of the news articles published about defendant herein is significant. Without exception, the admittedly extensive coverage was factual, objective, and simply recounts of the law enforcement and prosecutorial action as these events transpired. For example, on July 6, 1980, the Slidell Daily Times, in keeping with its policy for balanced and responsible coverage of the case, reported the entry of a plea of "not guilty" by defendant.[10] The same paper on July 16, 1980, reported a benefit picnic and dance to be held for Mark Brewster, another one of appellant's victims who was shot in the head.[11] The Daily Times reported the grand jury indictments as they were returned.[12]

Defendant made no showing prior to voir dire that the news media reports of the case did anything other than inform the public of the crime. Defendant failed to carry his burden of proof and the court judge was correct in delaying his ruling on the motion to change venue until after the voir dire was concluded.

Appellant asserts further that the trial judge should have ruled in his favor on the motion for change of venue at completion of the voir dire examination. To make a determination of this issue, it is important to examine the transcript. Most jurors on voir dire said they had heard or read of the case at some point during its development, but had not formed an opinion and could disregard the previous information.

The applicant alleged in his brief on appeal to the Louisiana Supreme

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9 See State v. Monk, 315 So.2d 727 (1975) at 735, and State v. Smith, 340 So.2d 222 (1976) at 224.

10 Record, Vol. II, page 225.

11 Record, Vol. II, page 227. In State v. Poland, 232 So.2d 499 (1970), the Supreme Court of Louisiana held that publicity relative to funds being raised for the family of the victim of a shooting was insufficient evidence on which to reverse a trial court denial of a motion for change of venue.

12 See Record, Vol. II, pages 200-224.

Court that the jurors were "less than candid", but he cited no words or conduct in support of this contention. Since he has never cited exact instances of duplicity and deception on the part of the prospective jurors in the voir dire transcript, the undersigned counsel has never known which prospective jurors were "less than candid" and at what portions of their testimony the alleged deceit occurred.

A recent case in which the trial court was called upon to decide a motion for change of venue after voir dire was State v. Williams, 385 So.2d 214 (1980). In Williams, all prospective jurors indicated knowledge of the crime obtained for the most part from newspapers and television. This Supreme Court of Louisiana found as follows at page 216, as to pre-trial publicity.

> "The press coverage might therefore be considered extensive within the limited geographical area involved. ... All but one of the newspaper articles introduced by the defendant at the hearing on the motion were purely factual accounts, either of the crime, the ensuing investigation, or the defendant's arrest and subsequent indictment."

The Supreme Court of Louisiana found that the defendant failed to introduce any direct evidence of any widespread prejudice against the defendant by examination of the prospective jurors. The Court found at page 217 that,

> "There was no evidence of any events in the community at large that would indicate that the community or the individuals in it were prejudiced against the defendant.
>
> The defendant having failed to show that he could not get a fair trial in Tensas Parish, either by showing prejudicial pre-trial publicity or evidence of prejudice on the part of prospective jurors, the trial court did not abuse its discretion in denying the motion to change venue. (Emphasis added)"

The result in State v. Sonnier, supra, was similar. In Sonnier, the defense failed to show such prejudice or undue influence in the community as would affect prospective jurors. All prospective Sonnier jurors testified that they could put aside whatever they had heard outside the courtroom, afford the defendant the presumption of innocence, and decide the case solely upon the evidence presented in court, although two prospective witnesses tes-

tified it would be difficult. The Supreme Court of Louisiana affirmed the denial of the motion for change of venue.

There are many Louisiana cases which have held that the decision as to changing venue is within the sound discretion of the trial court and will not be disturbed on review in the absence of any affirmative showing of error and abuse of discretion.[13]

The instant facts should be considered in light of the State v. Bell, supra, guidelines. As we have shown, the pre-trial publicity in this case, while extensive, was factual and informative and not inflammatory. The applicant showed no specific connection of government officials with the release of information to the news media and very little connexity appears from the testimony at the pre-trial hearings. The bulk of the news articles were during the summer of 1980, while the trial was not held until the end of October of that year. The jury was drawn from the entirety of Washington Parish. Neither the applicant nor his victim was a resident of Washington Parish, and neither was shown to have any connections to or family in that area. The applicant showed no other event occurring in Washington Parish which either affected or reflected the attitude of the community or individual jurors toward himself. The applicant further showed no factor likely to affect the candor and veracity of the prospective jurors on voir dire. According to the voir dire transcript, the extensive pre-trial publicity did not have a prejudicial effect on the prospective jurors.

The trial judge was correct in deferring judgment on the motion for change of venue until after the voir dire examination, when he properly denied the motion.

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13 See State v. Felde, 382 So.2d 1384 (1980); State v. Sonnier, 379 So.2d 1336 (1979); and State v. Matthews, 354 So.2d 552 (1978).

U.S. Supreme Court cases where trials were held to be fair despite widespread publicity are Stroble v. California, 343 U.S. 181, 72 S.Ct. 599 (1952); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 (1975); and Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962).

The applicant cites Irvin v. Dowd, 366 U.S. 717 (1961) in support of his position. In Irvin v. Dowd, this Honorable Court stated at page 722 as follows:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." (Citations omitted)

This Court, however, has held that the above stated rule cannot foreclose inquiry into the partiality of jurors in a given case.[14] But this Court has held that the challenger must show the actual existence of partiality in the mind of the juror, or the juror need not be excused, and that the finding of a trial court ought not to be set aside by a reviewing court unless the error is manifest.[15]

It is important to look at the actual words of the jurors in the instant case to determine whether partiality actually existed in their minds, as per the Reynolds v. United States test, citation footnote 14.

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[14] See Reynolds v. United States, 98 U.S. 145.

[15] See Reynolds v. United States, supra.

The first panel of twelve jurors was called at page 6 of Volume I of the actual trial transcript. Of these, three had never read of this case.[16] Eight had read an early newspaper account of the crime, but had not heard of the case in any other media source. Beginning at page 15, the prospective jurors were asked individually, whether they had formed an opinion as to the guilt or innocence of the accused from what they had read in the newspaper. The first juror stated that he couldn't remember what he had read.[17] Nine said they had formed no opinions. Two jurors, Mr. Burch and Mrs. Thomas, stated that they had formed opinions but that they could disregard anything they had read as well as the opinions they had formed.[18] The State excused Burch and the defense excused Thomas.

The second panel of twelve prospective jurors were called at page 72. Of this second set, four had heard about the case on the radio and read about it in the newspaper, and three of these saw the story on television. Two had never read about the case.[19] The remaining jurors in this set had read an early newspaper account but had not received information from any other source. Four stated that they could not put aside what they had read; the trial judge then excused these four on the court's behalf and called for four new prospective jurors to be seated. Of the new group of four prospective jurors, three had heard about the case in the newspaper and on television and one from the newspaper only. But none of the new group of four actually remembered the facts of the case or had formed any opinion at all.[20]

A new panel of prospective jurors was called. Of this group, one juror stated at voir dire was the first time he had heard of the case.[21] Only

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16 See pages 13 and 14, trial transcript.

17 See page 15, trial transcript.

18 See page 17, trial transcript.

19 See pages 82 and 83, trial transcript.

20 See page 91, trial transcript.

21 See page 146, trial transcript.

one juror had heard about the case on television.[22] All the rest of this panel had read about the case in an early newspaper report, but had heard of it through no other media source. Of this panel, one juror stated that she had formed an opinion about the case and the court excused her on its own motion.[23]

In the next group of prospective jurors called, there were only three people. One of these was excused due to a physical ailment. Both of the remaining people had read about the case in the newspaper and one had discussed the case with others. One had formed an opinion and the court excused him on its own motion. The last person was excused due to family illness.

Two persons were called in order for the parties to select an alternate juror. One of these read a newspaper account of the crime, and the other heard about it on television. Both testified they did not recollect the facts of the case.[24] Both stated that they could be fair and impartial and would base their opinion only on events within the courtroom. Both were accepted as alternates, and the panel was complete.

The State urges this Honorable Court to deny the writ application herein on this issue because there is no manifest error on the part of the trial court, and because the trial transcript herein as set forth above belies no actual existence of partiality in the minds of the prospective jurors in the voir dire transcript of this case.

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[22] See trial transcript, page 145.

[23] See trial transcript, page 147.

[24] See trial transcript, page 180.

STATE'S RESPONSE TO ALLEGATIONS OF IMPROPER CONDUCT OF VOIR DIRE

The applicant alleges that the trial court erred in not granting individual voir dire of prospective jurors.

On appeal to the Supreme Court of Louisiana, the applicant cited only one case in support of his position. That case was Nebraska Press Association v. Stuart, 96 S.Ct. 2791 (1976). The U.S. Supreme Court here considered a case in which a state judge imposed a prior restraint on news media not to publish accounts of a criminal proceeding. The opinion discusses the right to a fair and impartial trial, but the court here is clearly concerned with balancing First and Sixth Amendment protections and guarantees. While the U.S. Supreme Court states at page 2805 that "searching questioning of prospective jurors" may be an alternative to prior restraint of publication, the Court in no place in the opinion mandates individual questioning. Again, the applicant cited no jurisprudence from Louisiana on appeal.

It is clear that the purpose of voir dire examination is to determine the qualifications of prospective jurors by testing their competency and impartiality.[25]

The most recent Louisiana case on this issue was State v. Williams, 383 So.2d 996 (1980), an armed robbery prosecution. In Williams, the defendant contended the trial judge erred in denying his motion to examine prospective jurors individually and outside the presence of each other on voir dire. The Supreme Court of Louisiana held as follows on page 999:

> "In selecting a petit jury panel, details such as whether the jurors should be called singly or by groups are left to the court's discretion. The trial court can and should regulate such matters. La. Code Crim. P. Art. 784, Official Revision Comment (c). The

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[25] See State v. Nero, 319 So.2d 303 (1975).

> calling of prospective jurors in groups, rather than singly, and their examination in the presence of each other does not, in the absence of special circumstances, deny a defendant a fair trial. (Citations omitted)"

Similar results were reached in State v. McAllister, 253 La. 382, 218 So.2d 305 (1969); State v. Robinson, 302 So.2d 270 (1974); State v. Groves, 311 So.2d 230 (1975); and State v. Hegwood, 345 So.2d 1179 (1977). It is clear that there is no provision of Louisiana law requiring sequestration of prospective jurors during voir dire. By authority of all cases cited above, special circumstances must be shown by defendant to justify sequestration.

Article 784 of the Code of Criminal Procedure fixes the standard for selection of the petit jury panel as follows:

> "In selecting a penel, names shall be drawn from the petit jury venire indiscriminately and by lot in open court and in a manner to be determined by the court. (Emphasis added)"

As the comments to that Article explain, "Details such as whether the jurors should be called singly or by groups of two, three, etc., are left to the court's discretion."

In the instant case, the applicant pointed to nothing either at trial or on appeal which might have caused answers given by some prospective jurors to prejudice the views of other prospective jurors. The trial judge's refusal to insulate prospective jurors did not deny appellant a fair trial and was no abuse of discretion.

If reference be made to the voir dire transcript herein, it may be seen that great pains were taken so that individual prospective jurors' opinions were not expressed before the entire jury panel. For example, on page 15, Juror Burch states that he has formed an opinion. The prosecutor replies, "I don't want you to tell me what it is...." Throughout the transcript, no single juror's opinion of the case is expressed which could taint the whole. In every case where a juror stated that he or she had a fixed opinion, the

court excused that juror on its own motion. A sequestration of the panel and individual voir dire was unnecessary and not required by law.

The applicant cites Murphy v. Florida, 421 U.S. 794 (1975), in support of his position. In Murphy, the defendant was convicted of aggravated burglary. The crime received extensive press coverage because of the defendant's past crimes and his flamboyant lifestyle. The record in the case contained scores of articles concerning the defendant. After jury selection at trial, the trial court denied the defendant's motions to dismiss the jury due to partiality and for change of venue. This Honorable Court found that some of the jurors knew of the burglary, and all knew of the defendant's past crimes. This court found that the last of the news articles about the defendant occurred some seven months prior to trial and were factual in nature. This court found that 20 of 78 persons on the original jury panel were excused due to an opinion as to the defendant's guilt. This court concluded as follows at page 803:

> "This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.
>
> In sum, we are unable to conclude, in the circumstances presented in this case, that petitioner did not receive a fair trial. Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permits an inference of actual prejudice. The judgment of the Court of Appeals must therefore be affirmed."

In cases in which this Honorable Court has reversed state court convictions due to newspaper articles, the convictions were obtained in trials which were totally corrupted by the press coverage. These cases are Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); and Sheppard v. Maxwell, 384 U.S. 333 (1966). None of the three bears any resemblance to the facts of the instant application. Prejudice was presumed in the circumstances under which the trials in Rideau, Estes, and Sheppard

were held. In those cases the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. In Rideau the defendant had "confessed" under police interrogation to the murder of which he stood convicted. A 20-minute film of his confession was broadcast three times by a television station in the community where the crime and the trial took place. In reversing, the Court did not examine the voir dire for evidence of actual prejudice because it considered the trial under review "but a hollow formality" -- the real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras. The trial in Estes had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment. Similarly, Sheppard arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. Of these three cases, this Honorable Court in Murphy v. Florida, supra, at page 799, has stated as follows:

> "The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process."

It should be noted that in none of these cases has this court required that a jury be sequestered during voir dire.

In no place in the transcript is there even a suggestion that the Washington Parish community sentiment was so poisoned against Robert Willie as to impeach the impartiality and indifference of the jurors as set forth above. The trial setting was not inherently prejudicial, and the jury selection process did not permit an inference of actual prejudice. The trial

was not corrupted by press coverage; indeed, a number of prospective jurors testified that they had never even read of the case. The news media did not pervade the proceedings. Very few jurors had heard of the case by either radio or television. The limited juror exposure to news accounts of the crime with which Robert Willie was charged and the subsequent method of jury selection did not deprive this applicant of due process. This assignment of error is without merit.

STATE'S RESPONSE TO ALLEGATIONS OF ERROR IN THE REVIEW BY THE SUPREME COURT OF LOUISIANA AS TO PROPORTIONALITY

The Supreme Court of Louisiana, in its Rule 28, requires prosecutors in death penalty cases to submit a list of each first degree murder case in their respective districts. The lists must include the docket numbers, captions, crimes convicted, sentences actually imposed, and synopses of the facts in the records concerning the crimes and the defendants. Of course, some form of comparative proportionality review is constitutionally required as per Pulley v. Harris, 103 S.Ct. 1425 (1983).

Because his co-defendant, or another defendant in the same district, may receive a less severe sentence does not make the applicant's sentence ipso facto excessive. In Louisiana, co-defendants do not have to receive identical sentences. See State v. Jessie, 429 So.2d 859 (La., 1983); State v. Labure, 427 So.2d 855 (La. 1983); State v. Rogers, 405 So.2d 829 (La.,1981). Before imposing the death penalty, a Louisiana jury must consider both the crime, the particular defendant and aggravating and mitigating circumstances. Thus the Louisiana death penalty statutes are constitutionally correct as per Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972); and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978).

A death sentence is not necessarily disproportionate because one defendant is a factually similar case received life imprisonment. Proportionality is a safeguard against arbitrary and capricious action by a jury.[26] After a death penalty conviction, the Supreme Court of Louisiana reviews the crime and all relevant information on the defendant to discover whether the death sentence in a given case is disproportionate to the penalty imposed in similar cases in a district.[27]

The State of Louisiana respectfully suggests to this Honorable Court that the death penalty in the instant case is not disproportionate to the crime committed or to other crimes in the district because there have been no other crimes since 1976 as heinous as this one. There have been no others which so flagrantly called for the death penalty. It is important to turn to the facts of the case.

At the June 28, 1982 penalty phase hearing, several witnesses testified herein concerning the body of the victim of the murder. Michael Varnado, a district attorney investigator, found the body. At page 126 of the hearing transcript, he testified about the position of the body when he discovered it, as follows:

> "She was laid on top of her blue jeans, nude. Her hands were up above her head and her legs were spread, on her back."

Dr. Paul McGeary performed the autopsy on the victim. He testified beginning at page 136:

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26 See State v. Taylor, 422 So.2d 109 (La., 1982), at page 119.

27 See Louisiana Code of Criminal Procedure Article 905.9.

"This was the body of a young woman who had been dead for about a week. There was extensive drying and swelling of the skin and bloating of the body. There was a great deal of maggot infestation. She had light brown hair. She had a large opening in the skin of the front of her neck extending all the way across her neck and exposing the deep tissues of her neck. She had an opening of the tissues of the palm and thumb of the right hand going up to the index finger. She had tissue loss over the inner aspects of both thighs. She had a laceration of the opening of her vagina. The internal organs were in a state of decomposition because of the long period of time since her death, but she showed no evidence of having had any underlying disease and was in otherwise a condition of good health."

At page 37, the prosecutor questioned Dr. McGeary as follows:

Q. "Now as a result of the autopsy, did you reach or didyou arrive at an expert opinion as to the cause of her death?"

A. "I felt that she had suffered a deep wound at the front of her neck and that she had made some attempt to ward off somebody or some weapon with the right hand having suffered some damage to the right hand, also in that she had the injuries of the inner parts of her thigh, of the genital area and of the vaginal opening, indicating that she had been forcefully subjected to intercourse."

Q. "Insofar as the wound in the neck, would that wound cause death?"

A. "Yes, a deep wound that would involve the windpipe and the blood vessels of the neck would cause death."

Q. "Would it cause an immediate death, sir?"

A. "It would not be immediate in that it would require a few minutes of time for extensive bleeding to occur and for difficulty in breathing if the windpipe were opened and filled with blood."

Q. "Would it be what one might term a painful sort of death?"

A. "Yes."

Q. "Would you expect a person receiving that type of wound to struggle to get breath?"

A. "Yes, certainly."

Q. "Would it be easy for a person like that to speak, with a wound like that?"

A. "Not if the wound went across the windpipe, because that would divert the air from the voice box so that speaking would be not possible."

Q. "Now from the wound to the right hand you observed in the autopsy, is that what is commonly referred to as a defense wound?"

A. "Yes, sir."

Q. "And why would you as a pathologist label that sort of wound as a defense wound?"

A. "A defense wound is a kind of wound that is inflicted on a person's body when they attempt to protect themselves against an attacker. It usually occurs on the palm of the hands if they try to grab hold of a knife or a sharp weapon, that usually occurs on this aspect of the forearms if they are trying to ward off blows. It may occur on the elbows or on the knees or on the shoulders, the edges of the shoulders. The reason it is called a defense wound is the person is trying to defend herself or himself against the onslaught or another person."

Q. "Sir, would you have an expert opinion as to whether or not Faith Hathaway tried to defend herself?"

A. "I would interpret the wound on her right hand as a defense-type wound and that she tried to either grasp something or hold her hand in front of her in a defensive posture."

Q. "Insofar as the injuries that you noted on the inner thighs and the vaginal opening, what was it about those injuries that make you believe in your expert opinion it was forcible intercourse?"

A. "These are the typical and common injuries that occur under these circumstances when thighs are forced apart, there is a tendency for the inner aspects of the thighs to be bruised and to be scraped, the skin to be scraped away, and for the tissue to be bruised. The opening of the vagina characteristically tears when a very forceful sexual attack is made and the laceration that occurs is in a very characteristic position, longitudinal or long ways in the vagina, beginning right at the orifice, the narrowest part, and extending up inside the vaginal canal, the typical kind of stretching, traumatic or injurious lacerations that is casued by forceful intercourse."

Q. "And you would not find this type of injury in say a female who was simply involved in a vigorous act of intercourse?"

A. "No, sir, I would not expect deep lacerations of tissue to be tolerated under those circumstances."

Q. "So, therefore, Dr. McGeary, is it your expert opinion that Faith Hathaway was forcibly raped or that an act of forcible intercourse was performed upon her?"

A. "Yes, sir."

* * * *

PROSECUTOR:

"Your Honor, with the court's permission, I am going to ask one of our secretaries, Mrs. Debbie Mitchell, to step around and I would ask the doctor looking at the photographs to please position her body in the position in which it was found. Debbie, if you will simply lay down this way on the floor."

A. (Witness positions secretary) "Okay, both her hands up high over her head, palms up, both legs were spread very far apart, just about as far apart as they would go and bent just a little bit up like this. This is the way the photograph was pictured."

Q. "Now, Doctor, would you expect that a person that has received the injuries that you observed at autopsy to be found in that position if they had not been held until they were dead or unconscious?"

A. "No, I would not."

Q. "So then would it be your expert opinion that Faith Hathaway was held in that position until she died or became unconscious?"

A. "Yes, sir."

Q. "The legs being spread that far apart would be an uncomfortable position, would it not?"

A. "I would expect, yes."

Q. And so if -- is that one reason that you feel that she was dead when left or unconscious when left in order that they stay that far apart?"

A. "Yes."

Q. "What sort of position, if a person were not restrained until death or unconsciousness, would you

normally expect a person with a wound to the neck to reach in towards that wound?"

A. "Yes, that would be the expected reaction would be for the hands to come up to the area of the injury to attempt to cover it up, for the legs to come together and for the knees to be raised up in a defensive posture, also."

Q. "More or less a fetal position?"

A. "Yes."

Q. "So then it is your expert opinion that Faith Hathaway was held in that position until she died or until very close to death?"

A. "Yes."

Q. "Thank you,sir. Now, Doctor, at autopsy I believe you removed a necklace from the body, is that correct, sir?"

A. "Yes."

Q. "Would you describe the necklace, please."

A. "This was a thin gold chain with a medallion on it and on the medallion on one side it said 'Class of 1980' or 'Class of 80' and on the opposite side, as I recall, it said, 'Dawn of a new decade'."

Q. "And where did you find that?"

A. "It was embedded in the neck."

Q. "Was it embedded in the wound?"

A. "It was right down in the wound."

The cross examination by applicant's attorney began on page 142, as follows:

Q. "Doctor, during your autopsy, was it possible for you to determine when the forcible intercourse took place?"

A. "At -- I determined that that occurred at or near the time of death because of the nature of the injury to the vagina and the associated areas, showing no signs of healing or anything like that."

Q. "Well, could it have happened say within six hours of what you determined to be the time of death?"

A. "I would not expect it to because there was no swelling, there was no evidence that it reacted to the injury, that it was near the time of death."

Q. "Alright. Is it possible that the injury took place after death?"

A. "I don't believe so, no, sir."

Dr. McGeary explained further concerning the victim's vaginal injuries at page 143:

A. "I would expect that this injury would not occur after death because part of the reason that this injury occurs is the resistance, the attempt to resist the penetration which causes the tissues to tighten and to resist and to be, therefore, lacerated. After death there is a tendency for the muscles all to relax, for the tissue to stretch more easily, and I would not expect this to occur post mortem."

According to the pathologist quoted above, the victim herein displayed the below listed evidence of serious physical abuse, torture, and the pitiless infliction of unnecessary pain:

1. deep neck wound involving the windpipe and blood vessels;

2. defensive wound of the right hand;

3. injuries to the inner parts of the thigh;

4. injuries to the deep tissues of the genital area and vaginal opening;

5. extensive bleeding prior to death;

6. difficulty in breathing due to opening of the windpipe;

7. rape or forcible intercourse;

8. limbs held in an uncomfortable position until death; and

9. gold medallion embedded in the neck wound described in #1 above.

The evidence adduced at trial sets this case apart as the most heinous, atrocious and cruel crime committed since 1976, when the Louisiana Supreme Court began considering proportionality.

Further, the evidence at trial was clearly sufficient to support another independent aggravating circumstance. The pathologist's testimony quoted above also indicates that the victim was raped.

In Maggio v. Williams, 104 S.Ct. 311 (1983), the defendant argues that the Louisiana Supreme Court review of the proportionality of his death sentence on a district-wide basis did not ensure that his death sentence had been imposed in a rational and nonarbitrary manner. This Honorable Court stated at page 314, as follows:

> "Williams' challenge to the Louisiana Supreme Court's proportionality review also does not warrant the issuance of a writ of certiorari. The en banc Fifth Circuit has carefully examined the Louisiana Supreme Court's procedure and found that is 'provides adequate safeguards against freakish imposition of capital punishment.' Williams v. Maggio, 679 F.2d, at 395."

This court stated at page 314 that it, "has consistently denied challenges to the Louisiana Supreme Court's proportionality review scheme" that are idential to the challenge raised in Maggio v. Williams. In conclusion, this court stated at page 314, as follows:

> "Our prior actions are ample evidence that we do not believe that the challenge to district-wide, rather than state-wide, proportionality review is an issue warranting a grant of certiorari. Our view remains the same. Nor did Williams convince the lower courts that he might have been prejudiced by the Louisiana Supreme Court's decision to review only cases from the judicial district in which he was convicted. Indeed, the District Court examined every published opinion of the Louisiana Supreme Court affirming a death sentence and concluded that Williams' sentence was not disproportionate regardless whether the review was conducted on a district-wide or state-wide basis. We see no reason to disturb that judgment. Finally, Williams has not shown, nor could he, that the penalty imposed was disproportionate to the crimes he was convicted of committing."

The State urges this Honorable Court to find that this assignment is lacking in merit.

STATE'S RESPONSE TO ALLEGATIONS OF IMPROPER ARGUMENTS BY THE PROSECUTOR

The applicant cites Donnelly v. DeChristoforo, 416 U.S. 637 (1974) in support of his theory that the prosecutor herein made improper remarks to the jury. In this case, a prosecutor expressed a personal opinion as to the guilt of the defendant and also stated that the defense hoped for a verdict less than that charged. This Honorable Court stated at page 642 that ". . . not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice'." (citations omitted) This Honorable Court indicates that in order for it to overturn a state-court conviction, at page 643, that a prosecutor must 1) deny "a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel....," or 2) make remarks prejudicial "to a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right." Of the prosecutor's comments in Donnelly v. DeChristoforo, this Honorable Court concluded at page 643:

> "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that examination of the entire proceedings in this case supports that contention."

This Honorable Court noted further at page 646 that attorneys seldom carefully construct closing arguments in toto before the event and that, "improvisation frequently results in syntax left imperfect and meaning less than crystal clear." This court noted at page 645, that the prosecutor's remarks were but one moment in an extended trial. This court further stated at page 647, as follows:

> "While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."

This court observed the distinction clearly between ordinary trial errors of prosecutors and "egregious misconduct to amount to a denial of constitutional due process," and found no such misconduct in Donnelly.

Closing argument by the prosecutor was also an issue in a writ of habeas corpus in Williams v. Maggio, supra. In Williams v. Maggio, the prosecutor sought to minimize the jury's responsibility for imposing a death sentence by implying that the verdict was merely a threshold determination that would be corrected by the appellate courts if it were not the appropriate sentence. This Honorable Court rejected the applicant's contentions. Justice Stevens concurred, but noted that he did believe the closing argument to have been improper as follows:

> "In my opinion, the argument was prejudicial to the accused, both because it appears to have misstated the law and because it may have led the jury to discount its grave responsibility in determining the defendant's fate. A prosecutor should never invite a jury to err because the error may be corrected on appeal."

Justice Stevens concluded as follows:

> "Moreover, since competent counsel failed to object to the argument at the trial itself, thereby failing to avail himself of the usual procedure for challenging this type of constitutional error, I question whether it can be said that this trial was fundamentally unfair. See Rose v. Lundy, 455 U.S., at 543, 102 S.Ct., at 1216 and n.8 (STEVENS, J., dissenting). Accordingly, though not without misgivings, I concur in the Court's decision to vacate the stay. (Citations omitted)"

In the instant application, the applicant complains to two portions of the prosecutor's closing remarks. The first is at page 189 of the transcript for June 28 and 29, 1982, as follows:

> "Suppose that through an act of God that one of you at the moment that Robert Willie is between her legs and that Joe Vaccaro is holding her hands, that one of us walked up on that scene, nude girl, blindfolded, probably screaming, scared to death, and God willed it that we had a gun, I think almost everyone of us without hesitation would have blown them both away and that we'd have grabbed that little girl and if we had a blanket we'd have wrapped her, and we would have hugged her, and we would have been proud of ourself that we saved her life, that we kept her from being raped, and we wouldn't have had one bit of remorse that we used the gun and we'd have been right under the law. The law says that we would have been right to do exactly what we did. Well, if we have that right and the law says that we have that right, as it does, then we also have the right to impose the ultimate penalty on Robert Willie."

The prosecutor above was correctly stating Louisiana law. Louisiana Revised Statute 14:22 provides as follows:

> "It is justifiable to use force or violence or to kill in the defense of another person when it is reasonably apparent that the person attacked could have justifiably used such means himself, and when it is reasonably believed that such intervention is necessary to protect the other person."

There was no objection to this portion of the closing argument.

The second portion objected to by the applicant occurs at pages 192 and 193 of the same transcript as follows:

> "* * * Why is the only punishment death? Because if we as a community, if you as a group of citizens are going to say that life is valuable, you are going to say that Faith Hathaway had a right to live. If you believe that that little girl had a right to live, a right to go about her life, she may have never married a senator or president, but she was trying to do something constructive with her life. She was going in the service. It's not easy for somebody to do. But if you are going to say that she had a right to live, which she certainly did, and that Robert Willie didn't have a right to take her life, then as punishment for Robert Willie taking her life, you're going to give him life, where is the justice of it? If you're going to hold anything holy about the life of Faith Hathaway, if you're going to say that it has any value at all, you've got to say the death penalty, because otherwise you're saying Robert Willie, you life is more valuable than Faith Hathaway's, you life means more than Faith Hathaway. I certainly hope that you can't say that. The evidence certainly doesn't indicate that his life

> is even close to the value to that of Faith Hathaway, but even being putting a value on it, the two lives. He took her life. He deserves that."

This portion of the closing argument is of course not a statement of law and was not intended to be a statement of law. It is purely argument. It was not objected to at the time of the argument.

The instant arguments certainly are not misstatements and do not constitute a failure to observe the fundamental fairness essential to our concept of justice. They do not deny Robert Willie the benefit of any provision of the Bill of Rights or prejudice a specific right. Examination of the transcript in this case supports the State's contention that these remarks, a moment in a protracted trial, did not infuse the trial with unfairness or prejudice, and do not constitute prosecutorial misconduct. For these reasons, this assignment of error also lacks merit.

CONCLUSION

For all the reasons set forth above, the petition for certiorari should be denied.

Date: January 23, 1984.

RESPECTFULLY SUBMITTED:

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ORIGINAL

No. 83 - 5836

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT LEE WILLIS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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ATTORNEYS FOR PETITIONER

Petitioner's contention that the first two issues presented in the Petition are of sufficient importance to warrant granting the writ (Petition, at 15-16) is strongly supported by the Court's grant of certiorari in Patton v. Yount, 104 S.Ct. 272 (1983). Yount involves, as does this case, the constitutional standards to be applied when there is intense pretrial publicity, a request to change venue is denied, and there is allegedly reason to conclude that, despite their assurances of impartiality, selected jury members are unable to decide the case solely on the basis of the evidence presented at trial. Indeed, Mr. Willie's Petition cites the Third Circuit's opinion in Yount v. Patton, 710 F.2d 956 (3d Cir. 1983), in asserting that there is a pressing need for this Court to articulate the factors other than the percentages of biased veniremen that must be considered in determining whether the effects of massive pretrial publicity have been overcome. (Petition, at 22-23.)

Petitioner submits that his case affords the Court an excellent vehicle, along with Yount, for articulating these standards. Petitioner has clearly shown that four members of his jury heard the attorney for another defendant, whose voir dire was conducted separately but simultaneously, accuse Petitioner of committing the crime and that two veniremen who were peremptorily challenged gave inconsistent answers at the two voir dire proceedings in responding to questions about the impact of the pretrial publicity. Respondent's Opposition totally ignores this showing.

Petitioner respectfully requests that certiorari be granted and that his case be argued together with Patton v. Yount. A consolidated argument would assist the Court in articulating the appropriate constitutional standards which must be applied in the variety of contexts in which claims of a biased jury arise.

Dated: February 8, 1984

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

No. 83 - 5836

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT LEE WILLIE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

AFFIDAVIT OF SERVICE

COUNTY OF NEW YORK)
: ss.:
STATE OF NEW YORK)

RONALD J. TABAK, being duly sworn, states as follows:

1. I am an attorney for petitioner Robert Lee Willie. I am admitted to practice in the courts of the State of New York and am a member of the Bar of the Supreme Court of the United States.

2. On the 8th day of February, 1984, in compliance with Rule 28.3 of this Court, I caused one copy of the Reply in Support of Petition For A Writ Of Certiorari To The Louisiana Supreme Court to be mailed, first-class postage prepaid, to the following attorney: Margaret A. Coon, Esq., Assistant District Attorney, 22d Judicial District, 428 East Boston, Covington, Louisiana 70433.

3. I further state that all parties required to be served have been served.

Ronald J. Tabak

Ronald J. Tabak
Hughes Hubbard & Reed
One Wall Street
New York, New York 10005

Sworn to before me this
8th day of February, 1984.

Joseph B. Valentine

Notary Public

JOSEPH B. VALENTINE
Notary Public, State of New York
No. 31-4631458
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1985